Secrecy in the Second Circuit: Protective Orders in Police Misconduct Litigation After Civil Rights Law 50-a

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Can the public see whether a police officer sued for police misconduct in New York has a record of prior misconduct? This Note examines access and secrecy surrounding law enforcement misconduct records produced in federal civil rights litigation in New York. It argues that federal protective orders should respond to increased transparency norms at the state level in order to vindicate the public access interests inherent in liberal disclosure rules.

When New Yorkers injured by police officers file civil rights lawsuits in federal court, discovery sometimes reveals that the defendant officer has a history of misconduct. Despite the public concerns that this raises, federal courts in New York have historically shielded law enforcement disciplinary records from public disclosure under protective orders, relying on Federal Rule of Civil Procedure 26(c). In June 2020, however, the New York State Legislature repealed Civil Rights Law 50-a, establishing a state presumption of transparency for law enforcement records under New York's Freedom of Information Law with the intention of increasing transparency and addressing police brutality. Since then, federal courts presiding over police misconduct lawsuits have confronted whether their Rule 26(c) determinations to shield disciplinary records under protective orders should account for this change in state FOIL law.

The resulting decisions have been divided in outcome and inconsistent in reasoning. Courts in the Eastern District of New York have generally imposed higher standards for shielding police misconduct records in light of the state's new presumption of openness. But courts in the Southern District of New York have largely refused to consider the 2020 FOIL

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amendments in evaluating whether Rule 26(c) protection is warranted. The S.D.N.Y. also declined to reconsider automatic protective orders covering police misconduct records under its 1983 Plan.

This Note argues that the federal protective order inquiry under Rule 26(c) should account for increased transparency in state law—particularly in civil rights litigation, when the records at issue concern state officers sued for violating constitutional rights. The 2020 repeal of Civil Rights Law 50-a reflects evolving judgments about public accountability, while civil rights litigation implicates a particularly strong public interest in governmental transparency. New York's unsettled local landscape since the 2020 state law change presents a novel setting to examine entrenched issues—implicating the tensions between state and federal law, between the presumption of transparency and the reality of access, and between the competing interests of public accountability and private civil discovery. Ultimately, how federal courts respond to New York's 2020 shift toward transparency in state law will affect both federal procedural approaches to state decisions about public governance and the long-term impact of the legislature's efforts to combat police brutality.

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INTRODUCTION

A fundamental clash currently exists in New York federal courts. Following a June 2020 change to New York state law, the public has enjoyed a presumption of access to law enforcement disciplinary records under the state Freedom of Information Law.[1] In federal civil rights litigation, however, those same disciplinary records remain shrouded in secrecy. This Note examines whether the public may access law enforcement disciplinary records produced in New York federal civil rights litigation and argues that federal protective orders should be responsive to increased transparency norms at the state level in order to vindicate the public access interests inherent in liberal disclosure rules.

Under Federal Rule of Civil Procedure 26(c), courts may issue protective orders designating discovery documents as confidential upon a finding of "good cause" that disclosure will cause harm or embarrassment.[2] Rule 26(c)'s "good cause" standard is vague and the Second Circuit has not provided guidance, making the protective order inquiry highly discretionary for federal judges.[3] This discretion has historically resulted in generous protective orders over law enforcement disciplinary records.[4] As such, when citizens allege that they are victims of police misconduct and sue police officers and New York City, federal courts in New York generally find good cause to designate the defendant officer's history of misconduct as confidential.[5] This "good cause" standard

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1. Act of June 12, 2020, ch. 96, 2020 N.Y. Sess. Laws 780–81 (McKinney) (codified at N.Y. PUB. OFF. LAW §§ 86, 87, 89). "Law enforcement disciplinary records" include "complaints, allegations, and charges against an employee[,]" the transcript of any disciplinary hearing and any exhibits, the disposition of any disciplinary proceeding, and the written memorandum supporting the disposition. N.Y. PUB. OFF. LAW § 86(6) (McKinney 2025).

2. FED. R. CIV. P. 26(c).

3. *See* Haidon v. Town of Bloomfield, 552 F. Supp. 3d 265, 269 (D. Conn. 2021) ("At least in this Circuit, district courts have not fully settled on a test for evaluating what may amount to 'good cause' under Rule 26(c).").

4. *See* Chelsea Hanlock, Note, *Settling for Silence: How Police Exploit Protective Orders*, 109 CALIF. L. REV. 1507, 1540–42 (2021) (showing that stipulated protective orders in police misconduct lawsuits overwhelmingly designated the officers' disciplinary histories as confidential); *see also infra* Part I.B.2.

5. In one representative case discussed *infra* Part II, plaintiff Ikeem Fowler-Washington alleged that NYPD officers used excessive physical force when arresting him in his home. Fowler-Washington v. City of New York, 2020 WL 5893817, at *1 (E.D.N.Y. Oct. 5, 2020) (internal citation omitted). He sued the city under Section 1983 and obtained the prior misconduct records of the defendant-officers in discovery. *Id.* But these records could not be publicly disclosed due to a broad protective order shielding the discovery. *Id.* at *5.

has remained friendly to police privacy concerns even after the state legislature declared those same records to be presumptively accessible to the public under the state Freedom of Information Law in 2020.[6]

By repealing New York Civil Rights Law 50-a ("CRL 50-a" or "50-a") in June 2020, the New York State Legislature established a state presumption of transparency for police disciplinary records, funneling them into the state Freedom of Information Law.[7] Federal courts in New York presiding over police misconduct lawsuits have, consequently, confronted whether their Rule 26(c) findings of good cause to designate the same records as confidential should respond accordingly. Current incentives—including the cost of contesting protective orders and the limited benefit to individual plaintiffs of public disclosure—discourage litigating protective orders, meaning that courts have rarely addressed this question.[8] The few resulting decisions diverge in outcome and offer inconsistent reasoning. While courts in the Southern District of New York stridently refuse to consider the state FOIL change in the federal protective order analysis, courts in the Eastern District of New York have imposed higher standards for designating police misconduct records as confidential in response to New York State's new presumption of openness.[9] This Note argues that this latter approach is correct: The federal protective order inquiry in Rule 26(c) must respond to increased transparency in state law, especially in civil rights litigation against state officers.

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6. *See, e.g.*, *Fowler-Washington*, 2020 WL 7237683, at *3 (designating defendant-officers' disciplinary records as confidential under a protective order even after the repeal of Civil Rights Law 50-a).

7. Act of June 12, 2020, ch. 96, 2020 N.Y. Sess. Laws 780–81 (McKinney) (codified at N.Y. PUB. OFF. LAW §§ 86, 87, 89) (repealing the law that had exempted police misconduct records from the state Freedom of Information Law).

8. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 97 (1974) (positing that certain "one-shotters" in the courts, such as civil rights plaintiffs, have different litigation incentives than repeat players); *see also* Hanlock, *supra* note 4, at 1558 (suggesting that the fact that the S.D.N.Y. grants protective orders over certain police disciplinary records *automatically* under Local Rule 83.10 may disincentivize plaintiffs from contesting these orders, since they believe that the court will grant the protective order).

9. *See* Capellan v. City of New York, 2021 WL 12147771, at *3 (E.D.N.Y. Jan. 7, 2021), *aff'd*, 2021 WL 12147783 (E.D.N.Y. Apr. 9, 2021) ("[I]n the absence of the state protections provided by 50-a, [defendants] bear the burden of persuading this Court that there is some other basis for shielding the officers' records from the public."); *Elliot v. City of New York*, 2020 WL 6782046, at *6 (S.D.N.Y. Nov. 18, 2020) ("New York's repeal of Section 50-a simply has no bearing on this discovery issue in a federal case based on federal law.").

New York's unsettled local landscape since the 2020 repeal of Civil Rights Law 50-a presents a novel setting to examine entrenched issues. Although the situation that New York presents is circumscribed in scope—involving only law enforcement disciplinary records in civil rights litigation in federal court, having been disclosed in discovery but marked as confidential under a Rule 26(c) protective order, and since the repeal of Civil Rights Law 50-a in June 2020—the questions it raises are much larger. They implicate the tensions between state privileges and federal civil rights laws, between the presumption of transparency and the reality of access, and between the goals of public accountability and private civil discovery. The response of federal courts to New York's 2020 change in state transparency laws will ultimately affect both federal procedural approaches to state decisions about public governance and the long-term impact of 2020's legislative pushes to combat police brutality. The answer is the same at both levels: The balance should tip toward transparency.

This Note proceeds in three parts. Part I examines Rule 26(c) and the Second Circuit's unsettled approach to the federal "good cause" inquiry, as well as the role that law enforcement disciplinary records play in Section 1983 and *Monell* litigation. It sets out the public interest in police misconduct records and establishes the problem of broad protective orders over these records in federal civil rights suits. Part II analyzes the post-2020 split among federal district courts in New York over whether Rule 26(c)'s good-cause inquiry should respond to New York's new presumption of transparency for police disciplinary records. It argues that the Southern District's insistence that federal discovery law is wholly insulated from state transparency norms rests on flawed assumptions about the relationship between federal procedure and state public access interests. Part III contends that federal courts should treat state transparency law as an important consideration in determining whether "good cause" exists under Rule 26(c), particularly where the discovery materials concern public officials accused of constitutional misconduct. Limiting protective orders over police misconduct records in federal court in response to state-level initiatives promoting transparency would better vindicate the accountability and public access interests underlying both Section 1983 and New York's repeal of Civil Rights Law 50-a.

I. RULE 26(C) AND POLICE DISCIPLINARY RECORDS IN CIVIL RIGHTS LITIGATION

Federal protective orders sit at the intersection of two competing commitments in civil litigation: privacy and transparency. On the one hand, Rule 26(c) authorizes courts to shield litigants from harms associated with disclosure during discovery; on the other hand, the Federal Rules of Civil Procedure presume broad public disclosure of relevant information, and police misconduct litigation implicates especially weighty public interests in governmental accountability.[10] These competing principles collide in federal civil rights litigation involving police disciplinary records. In New York, the Second Circuit's lack of guidance has left district courts with substantial discretion over discovery confidentiality, while stipulated protective orders and the Southern District's Section 1983 Plan continue shielding police misconduct records from public disclosure even after New York adopted a legislative presumption of transparency with the repeal of Civil Rights Law 50-a.

A. RULE 26(C) PROTECTIVE ORDERS

Rule 26(c) of the Federal Rules of Civil Procedure governs protective orders over discovery in federal civil litigation.[11] The initial question of whether a party must turn over discovery to an adverse party is governed by Rule 26(b), which empowers parties to obtain relevant and proportional nonprivileged discovery.[12]

10. FED. R. CIV. P. 26(c) (stating that a court may choose to keep discovery materials confidential upon a party's showing of "good cause . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"). On the presumption of public disclosure of relevant discovery embedded in the Federal Rules of Civil Procedure, see S.J. Mercury News, Inc. v. U.S. Dist. Ct., 187 F.3d 1096, 1103 (9th Cir. 1999) ("It is well-established that the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public."); Hanlock, *supra* note 4, at 1513 (cataloging cases from a majority of federal circuits that have affirmed a litigant's ability to use pretrial discovery for any lawful purpose); ROBERT TIMOTHY REAGAN, FED. JUD. CTR., CONFIDENTIAL DISCOVERY: A POCKET GUIDE ON PROTECTIVE ORDERS 4 (2012), https://www.fjc.gov/sites/default/files/2012/ConfidentialDisc.pdf [https://perma.cc/UJA6-TC8S] (explaining that parties to civil litigation "presumptively have a right, in part protected by the First Amendment, to share what they learn in discovery with other persons, including news media").

11. FED. R. CIV. P. 26(c).

12. *Id.* subdiv. (b).

Once the relevant and proportional discovery under Rule 26(b) has been turned over, Rule 26(c) governs who may see it.[13]

The default status of discovery in federal civil cases is disclosure. Parties that obtain information through the civil discovery process may presumptively share that information with the world.[14] Rule 26(c) controls the "override mechanism": Courts may issue protective orders to prohibit parties from sharing the information unearthed in discovery.[15] Upon a motion for a protective order, Rule 26(c) grants that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[16] Once a court imposes a protective order under Rule 26(c), the confidential documents become highly restricted to the public.[17] These restrictions may also involve requirements that the parties file the confidential documents under seal or destroy them after the lawsuit.[18]

Interpretations of this broad "good cause" standard to protect a party "from annoyance, embarrassment, oppression, or undue burden or expense" varies by circuit.[19] In four Circuits—the First, Fifth, Sixth, and Eighth—a "finding of good cause must be based on a particular factual demonstration of potential harm" that would occur in the absence of a protective order.[20] In the Seventh Circuit and the D.C. Circuit, "good cause" for a protective order requires balancing public versus private interests.[21] Three other

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13. *Id.* subdiv. (c).

14. Nora Freeman Engstrom et al., *Secrecy by Stipulation*, 74 DUKE L.J. 99, 108 (2024); *see also* Jepson, Inc. v. Makita Elec. Works, Ltd., 30 F.3d 854, 858 (7th Cir. 1994) ("Absent a protective order, parties to a law suit may disseminate materials obtained during discovery as they see fit.").

15. Engstrom et al., *supra* note 14, at 109.

16. FED. R. CIV. P. 26(c).

17. *See* Engstrom et al., *supra* note 14, at 109.

18. Gustavo Ribeiro, *[Marked Confidential]: Negative Externalities of Discovery Secrecy*, 100 DENV. L. REV. 171, 173, 189 (2022).

19. Engstrom et al., *supra* note 14, at 111.

20. Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986); *see also* Equal Emp. Opportunity Comm'n v. BDO USA, L.L.P., 876 F.3d 690, 698 (5th Cir. 2017) (holding that Rule 26(c) "contemplates a particular and specific demonstration of fact" (quotation marks omitted)); Serrano v. Cintas Corp., 699 F.3d 884, 901 (6th Cir. 2012) ("This Circuit has endorsed the view that to justify a protective order, one of Rule 26(c)(1)'s enumerated harms must be illustrated with a particular and specific demonstration of fact . . . ." (quotation marks omitted)); Gen. Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir. 1973) (holding that "good cause" under Rule 26(c) requires "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements").

21. Engstrom et al., *supra* note 14, at 111; *see* Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999) (holding that there is good cause in

Circuits—the Third, Ninth, and Eleventh—require movants to make a particularized showing of potential harm and demonstrate that the weight of the interests favors secrecy.[22] The Third Circuit deserves particular attention. It articulated a seven-factor test to guide district courts in evaluating "good cause" under Rule 26(c), with a focus on the public interest values at stake.[23]

By contrast, the good cause inquiry is unsettled in the Second Circuit.[24] In 2021, a dispute over a protective order in the District of Connecticut led the court in *Haidon v. Town of Bloomfield* to conclude that "at least in this Circuit, district courts have not fully settled on a test for evaluating what may amount to 'good cause' under Rule 26(c)."[25] Some courts in the Second Circuit, *Haidon* cataloged, held that the party opposing disclosure must show a "particular and specific demonstration of fact" that disclosure would result in a serious injury.[26] Other courts "dispensed with the specificity requirement," demanding only a showing of good

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the Seventh Circuit when "the property and privacy interests of the litigants" exceed the public's interest in publication); United States v. Microsoft Corp., 165 F.3d 952, 959–60 (D.C. Cir. 1999) (holding that in the D.C. Circuit, district courts must balance "all relevant interests," including third party interests).

22. *See, e.g.*, Shingara v. Skiles, 420 F.3d 301, 306–07 (3d Cir. 2005) (holding that "there is good cause when a party shows that disclosure will result in a clearly defined, specific and serious injury but that broad allegations of harm are not sufficient to establish good cause"); Phillips *ex rel.* Ests. of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1210–11 (9th Cir. 2002) ("For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted."); Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1205–06 (11th Cir. 1985) ("In ascertaining the existence of good cause, four criteria are determinative: the severity and the likelihood of the perceived harm; the precision with which the order is drawn; the availability of a less onerous alternative; and the duration of the order.").

23. *See* Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787–91 (3d Cir. 1994); *In re* Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 924 F.3d 662, 671 (3d Cir. 2019) (affirming *Pansy*'s seven factors for discovery confidentiality and emphasizing that the court's analysis "should always reflect a balancing of private versus public interests." (internal quotation marks omitted) (quoting Glenmede Tr. Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995)).

24. Engstrom et al., *supra* note 14, at 112 n.57. For the Fourth Circuit, *see* Ardrey v. United Parcel Serv., 798 F.2d 679, 682 (4th Cir. 1986) (noting that district courts enjoy a "wide latitude in controlling discovery"). For the Tenth Circuit, *see* Rohrbough v. Harris, 549 F.3d 1313, 1321 (10th Cir. 2019) (asserting that Rule 26(c)'s good cause standard is "highly flexible") (quoting *Microsoft Corp.*, 165 F.3d at 959)).

25. Haidon v. Town of Bloomfield, 552 F. Supp. 3d 265, 269 (D. Conn. 2021).

26. *Id.* (quoting Schoolcraft v. City of New York, 2013 WL 4534913, at *3 (S.D.N.Y. Aug. 27, 2013)). *Compare In re* Parmalat Sec. Litig., 258 F.R.D. 236, 244 (S.D.N.Y. 2009) ("The party opposing disclosure must make a particular and specific demonstration of fact showing that disclosure would result in an injury sufficiently serious to warrant protection . . . ."), *with* Topo v. Dhir, 210 F.R.D. 76, 77 (S.D.N.Y. 2002) ("[A] protective order should be granted so long as the plaintiff can show good cause.").

cause.[27] Ultimately, *Haidon* found "a split within the district courts of this Circuit as to the showing necessary to establish that good cause exists."[28] The upshot, *Haidon* concluded, was that district courts in the Second Circuit retained wide discretion without any binding guidance since "the Second Circuit has not yet weighed in on the issue."[29]

B. LAW ENFORCEMENT DISCIPLINARY RECORDS

The unsettled test for Rule 26(c) in the Second Circuit has allowed a split to fester within the Second Circuit with respect to protective orders over law enforcement disciplinary records in civil rights litigation. While New York has adopted a legislative presumption of transparency by making police disciplinary records subject to FOIL disclosure, federal courts in the S.D.N.Y. have continued to shield those same records through broad protective orders under Rule 26(c).

1. *The Public Interest in Law Enforcement Disciplinary Records*

Law enforcement disciplinary records occupy a uniquely important position in civil rights litigation and public accountability debates, since they may contain evidence of an individual officer's prior misconduct, or of a broader departmental or institutional tolerance of unconstitutional policing.[30] As a result, disputes over the confidentiality of disciplinary records implicate interests that extend beyond the immediate parties to a lawsuit. This section explains why police misconduct records are particularly valuable in Section 1983 litigation, how New York historically shielded those records through Civil Rights Law 50-a, and why the repeal of 50-a fundamentally altered the transparency interests at stake in disputes over federal protective orders.

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27. *Haidon*, 552 F. Supp. 3d at 269; *see also*, *e.g.*, *Topo*, 210 F.R.D. at 77.
28. *Haidon*, 552 F. Supp. 3d at 269 (quoting *Schoolcraft*, 2013 WL 4534913, at *3).
29. *Id.*
30. Hanlock, *supra* note 4, at 1521 (explaining the ways in which information disclosed in individual police misconduct cases can have wider effects for the press, police department reform, and other subsequent lawsuits).

a. *Law Enforcement Disciplinary Records in Federal Civil Rights Litigation*

Law enforcement disciplinary records are subject to the Rule 26(c) protective order inquiry when they are produced in discovery in civil litigation. This posture is most common in lawsuits brought pursuant to Section 1983 of the Civil Rights Act, which provides a private right of action for individuals to sue state officials for violating constitutionally guaranteed civil rights.[31] Rule 26(b) authorizes broad discovery, so victims of police brutality can often obtain records relating to whether that defendant has faced disciplinary proceedings or been subject to prior civilian complaints.[32] Extensive disciplinary history may help convince a judge or jury of a plaintiff's truthfulness or may be relevant to punitive damages. Conversely, an absence of prior discipline for misconduct may make it harder to show misconduct in the current case, and the case may settle accordingly.

Disciplinary records are particularly valuable in litigation challenging systemic unconstitutional patterns or practices in municipal entities.[33] Under *Monell v. Department of Social Services*, local governments may be held liable under Section 1983 for constitutional violations resulting from their policies or customs.[34] In the context of police misconduct, *Monell* allows plaintiffs to hold local governments and agencies liable for officer

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31. 42 U.S.C. § 1983 (providing for a civil action for a deprivation of rights). On the development of Section 1983 as a federal damages remedy, see generally 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (2025) (surveying the doctrinal development and modern operation of Section 1983 litigation); *see also* Monroe v. Pape, 365 U.S. 167, 171–87 (1961) (holding that Section 1983 provides a federal damages remedy against state officials acting under color of law, even where state law also affords a remedy).

32. FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . ."); Hanlock, *supra* note 4, at 1511 (discussing the discovery typically granted in police misconduct cases).

33. See Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 690–91 (1978) (holding that local governments "may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels"); see also Nancy Leong, Katelyn Elrod & Matthew Nilsen, *Pleading Failures in Monell Litigation*, 73 EMORY L.J. 801 (2024) (explaining that, in the decades following *Monell*, "the Supreme Court recognized a number of theories by which plaintiffs can establish a municipal policy or custom," including "a widespread pattern of behavior" (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 167–68 (1970))).

34. *Monell*, 436 U.S. at 694–95 (holding that municipalities are "persons" subject to suit under Section 1983 when constitutional injuries result from official policy or custom).

misconduct under Section 1983 when plaintiffs establish that the injury stemmed from a police department policy, practice, or custom that led directly to a violation of the plaintiff's constitutional rights.[35] Law enforcement disciplinary records can be essential to *Monell* claims because such suits typically involve officers with histories of misconduct—indeed, "an officer's record of misconduct might be the 'smoking gun' that reveals an improper pattern and practice within the municipality."[36]

Protective orders over these records, therefore, may limit similarly situated plaintiffs from litigating future cases against the same municipal defendants. If a plaintiff succeeds in accessing discovery under Rule 26(b) about an NYPD officer or practice that led to their injury, they may use that discovery in their own case. But a protective order over that discovery, granted under Rule 26(c), limits that discovery to the plaintiff's own case, shielding it from disclosure to the press or to other plaintiffs and overriding the default public status of that discovery.[37] Subsequent plaintiffs who are injured in similar ways then have no knowledge of or access to the discovery produced to the first plaintiff, and each one

35. *See id.* at 690–91; *see also* Floyd v. City of New York, 959 F. Supp. 2d 540, 659–60 (S.D.N.Y. 2013) (finding that the NYPD was liable under *Monell* for a widespread practice of unconstitutional racial profiling in its stop-and-frisk practices, because "[d]espite the NYPD's deliberate failure to collect accurate data regarding stops that violate the Fourth Amendment, there is sufficient evidence of such stops to establish *Monell* liability based on "practices so persistent and widespread as to practically have the force of law").

36. Michael P. Doyle & Emma Brockway, Civil Rights and Protective Orders add. at D-8 (Oct. 8, 2021), *in* 6 BRIDGE: INTERDISC. PERSPS. ON LEGAL & SOC. POL'Y, no. 2, 2021. For more on the current state of *Monell* pattern and practice litigation, see generally Joanna C. Schwartz, Monell*'s Untapped Potential*, 125 COLUM. L. REV. 925 (2025) (arguing that plaintiffs should pursue *Monell* claims based on police departments' disregard of lawsuits brought against them and their officers). In general, a municipality can be held liable under Section 1983 for violating the Constitution under four theories of municipal liability: (i) by adopting an expressly unconstitutional policy; (ii) by the acts of a final policymaker; (iii) by failing to act through "deliberate indifference"; or (iv) by a widespread custom. *Id.* at 931; Starbuck v. Williamsburg James City Cnty. Sch. Bd., 28 F.4th 529, 532–33 (4th Cir. 2022) (setting out these four theories of *Monell* liability); Jackson v. City of Cleveland, 925 F.3d 793, 828 (6th Cir. 2019) (same). The Supreme Court recognized the third theory—"deliberate indifference" through a failure to act—in City of Canton v. Harris, 489 U.S. 378, 388 (1989). *City of Canton* established three requirements for a "failure-to-train" claim: Notice, deliberate indifference, and causation. *See* Schwartz, *supra*, at 932. But Connick v. Thompson, 563 U.S. 51, 62–63 (2011), emphasized the very high standard of fault for a sufficient failure-to-train claim, holding that the Orleans Parish District Attorney's office could not be found civilly liable after trial prosecutors withheld critical evidence of a defendant's likely innocence.

37. *See* Engstrom et al., *supra* note 14, at 108–09; Jepson, Inc. v. Makita Elec. Works, Ltd., 30 F.3d 854, 858 (7th Cir. 1994) ("Absent a protective order, parties to a law suit may disseminate materials obtained during discovery as they see fit.").

must duplicate the expensive and drawn-out discovery process to seek the same information. When one plaintiff accesses the "smoking gun" in discovery but it is concealed from those outside of the litigation by a protective order, other plaintiffs who are injured by related practices or the same officers struggle to access the same information in cases about related violations.[38] After all, these protective orders only emerge in lawsuits when police misconduct has injured a civilian, and often the defendants desire confidentiality precisely because the disciplinary histories would reveal serious or serial misconduct.[39]

Secrecy over misconduct records in Section 1983 lawsuits undermines police accountability in two main ways, explained below. First, secrecy makes it harder to collect information on systemic failures. And second, it potentially prolongs the tenure of abusive officers, risking further civilian injuries.

First, protective orders over disciplinary records "stymie[ ] plaintiffs' cooperation across actions involving overlapping issues or defendants," requiring plaintiffs' lawyers to "reinvent the wheel" in each case.[40] The problem persists at plaintiffs' firms that bring multiple cases against the same defendant officers, since nearly all protective orders prohibit all future use beyond the instant litigation.[41] These orders prohibit firms from using their institutional knowledge to build databases of problem officers, which could be used to show systemic departmental failures.[42] Repeat litigators have described these protective orders as a "prison," since they make it harder to "prove that there's a pattern of practice, no matter what was developed in these other cases."[43] The ability to draw on previously-revealed misconduct records would help establish patterns of problematic departmental customs, and could thus support *Monell* suits challenging the unconstitutional policies, practices, or behaviors.[44]

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38. Doyle & Brockway, *supra* note 36, add. at D-8.

39. Hanlock, *supra* note 4, at 1522–23.

40. *See* Engstrom et al., *supra* note 14, at 124–25 (explaining how broad protective orders raise the cost of litigation through the example of early tobacco tort litigation).

41. *See* Hanlock, *supra* note 4, at 1559 (noting that "[n]early all the protective orders" in Hanlock's analysis of lawsuits against the NYPD prevented future "use" beyond the scope of the litigation, and some also required plaintiffs' attorneys to destroy or return protected materials).

42. *Id.*

43. Doyle & Brockway, *supra* note 36, at 3.

44. *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013) (establishing New York City's liability under *Monell* for the NYPD's stop-and-frisk policy,

Second, secrecy over these misconduct records prevents the public from identifying and terminating repeatedly violent officers.[45] Misconduct records produced in Section 1983 litigation are important because defendants in such suits are likely to have extended histories of misconduct.[46] An analysis of fifty thousand civilian allegations of misconduct against Chicago Police Officers revealed a "strong nonlinear relationship" between officers who were the subjects of civilian complaints and officers accused of serious misconduct in Section 1983 suits.[47] The study suggests that a few officers engage in misconduct more frequently and more seriously than almost all others, so identifying these officers could allow the public to demand their removal and "engage in reforming police disciplinary systems."[48]

Without protective orders shielding defendant officers' misconduct histories, citizens and organizations could more effectively pressure police departments to develop robust procedures for evaluating and terminating abusive officers.[49] Outside of *Monell* suits, which can seek injunctions against illegal department-wide practices, most Section 1983 suits seek civil damages to compensate the individual victims of police brutality.[50] Translating these damages into long-term changes in police practices requires public pressure.[51] Many police departments

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which violated plaintiffs' Fourteenth Amendment rights due to the "*policy* of indirect racial profiling based on local criminal suspect data" (emphasis in original)).

45. Cynthia H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY L. REV. 148, 182 (2019).

46. Hanlock, *supra* note 4, at 1522–24.

47. *See id.* (explaining that in the Chicago dataset, the top 1% of officers with the most civilian complaints against them generated almost five times as many settlements with roughly four times the amount of total damage payouts than would be expected in a linear relationship). This empirical data "substantiates the intuition that officers with more misconduct records are more likely to use excessive force against civilians in the future," highlighting the importance of identifying officers with extensive misconduct histories. *Id.*

48. *Id.*; *see also* Conti-Cook, *supra* note 45, at 182.

49. Hanlock, *supra* note 4, at 1522–24.

50. *See* MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, FED. JUD. CTR., SECTION 1983 LITIGATION 190 (2d ed. 2008). *But see* Hanlock, *supra* note 4, at 1521 (explaining how Section 1983 suits for money damages can also "force police departments to enter into settlement agreements with provisions for reform," as in a suit requiring the Wilmington Police Department to evaluate its deescalation tactics and training).

51. Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 846 (2012) (studying five police departments in Los Angeles County, Portland, Denver, Seattle, and Chicago, and documenting how "high-profile cases and large damages awards may inspire behavior change," but departments often collect little information on "run-of-the-mill damages actions," which makes it difficult to achieve reform from lawsuits alone, without additional press or public pressure).

simply "ignore lawsuits that do not inspire front-page newspaper stories, candlelight vigils, or angry meetings with the mayor," scholar Joanna Schwartz has found.[52] Continuing to shield police misconduct records hurts police accountability efforts, promotes secrecy over public functioning, hinders the long-term potential of civil rights litigation, and ignores the deliberate policy response to the abusive policing crisis.[53]

b. *Law Enforcement Disciplinary Records in the New York State Freedom of Information Law*

Law enforcement records are state records—and can therefore also be subject to the state Freedom of Information Law (FOIL).[54] The confidentiality of law enforcement disciplinary records under state transparency laws varies by state. Over thirty states make law enforcement disciplinary records confidential or impose limited availability.[55] In twelve states, disciplinary records are public, and citizens may request them under the state transparency law.[56] Although the public must actively request the records to access them, FOIL's underlying presumption is still disclosure: FOIL presumes that all agency records are available to the public unless they satisfy a statutory exemption.[57]

From 1976 until 2020, New York blocked public access to police misconduct records, exempting them from the state FOIL. CRL 50-a exempted records "used to evaluate performance" of police

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52. *Id.* at 844.

53. *See* Conti-Cook, *supra* note 45, at 153–75 (discussing the harms of shielding police disciplinary records from the public).

54. N.Y. PUB. OFF. LAW § 87 (McKinney 2025). There are exceptions for records that "interfere with law enforcement investigations or judicial proceedings," which may be exempted from FOIL disclosure. *Id.* § 87(2)(e)(i).

55. Hanlock, *supra* note 4, at 1528; *see, e.g.*, DEL. CODE ANN. tit. 11, § 9200(c)(12) (2026) ("[R]ecords compiled as a result of . . . [a] disciplinary grievance procedure are confidential and may not be released to the public."); MISS. CODE ANN. § 25-1-100(1) (2025) (exempting "[p]ersonnel records . . . in the possession of a public body" from disclosure under Mississippi's Public Records Act of 1983). For a full accounting of the police misconduct record laws in every state, see Kallie Cox & William Freivogel, *Analysis of Police Misconduct Record Laws in All 50 States*, PULITZER CTR. (May 12, 2021), https://pulitzercenter.org/stories/analysis-police-misconduct-record-laws-all-50-states [https://perma.cc/458Z-4E7F].

56. Hanlock, *supra* note 4, at 1529.

57. Gould v. N.Y.C. Police Dep't, 675 N.E.2d 808, 811 (1996) ("All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2)."); *see also* Michael J. Grygiel, *New York Open Government Guide*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/open-government-guide/new-york/ [https://perma.cc/WH9Y-HL6Z] (last visited June 7, 2026).

officers, firefighters, and correction officers.[58] Its scope was enormous. Originally intended to prevent criminal defense lawyers from impeaching or embarrassing police witnesses in criminal trials, CRL 50-a was "expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer."[59] One court described the law's effect as making "*all* records of police conduct or misconduct essentially invulnerable" to the state disclosure law.[60] CRL 50-a was, according to the New York Civil Liberties Union, "arguably the worst law in the nation when it comes to the public's ability" to access misconduct records.[61]

While in effect, 50-a's state restrictions on disciplinary records aligned with the protective orders that federal courts found "good cause" to impose under Rule 26(c) in federal litigation. This accord lasted through June 12, 2020, when the New York State legislature repealed Civil Rights Law 50-a.[62]

The campaign to repeal 50-a grew in part and gained momentum out of the Black Lives Matter protests and drew on broader campaigns for police reform.[63] Advocates for the repeal,

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58. N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2020), *repealed by* Act of June 12, 2020, ch. 96, 2020 N.Y. Sess. Laws 780–81 (McKinney).

59. *Annual Report to the Governor and State Legislature*, 2014 COMM. ON OPEN GOV'T ANN. REP. 3, https://opengovernment.ny.gov/system/files/documents/2021/12/2014-annual-report.pdf [https://perma.cc/Q6W5-LZA2]; *see also* Daily Gazette Co. v. City of Schenectady, 710 N.E.2d 1072, 1073, 1078 (N.Y. 1999) (withholding police misconduct records under CRL 50-a from a FOIL request submitted by two newspapers after eighteen officers "became involved in a confrontation with two civilians" and "pelted the civilians' vehicle with raw eggs").

60. Schenectady Police Benevolent Ass'n v. City of Schenectady, No. 2020-1411, slip op. at 7 (N.Y. Sup. Ct. Dec. 29, 2020) (emphasis in original).

61. Stephanie Wykstra, *The Fight for Transparency in Police Misconduct, Explained*, VOX (June 16, 2020, at 07:30 ET), https://www.vox.com/2020/6/16/21291595/new-york-section-50-a-police-misconduct [https://perma.cc/DVS6-GUC2].

62. Act of June 12, 2020, ch. 96, 2020 N.Y. Sess. Laws 780–81 (McKinney) (codified at N.Y. PUB. OFF. LAW §§ 86, 87, 89).

63. Roy S. Gutterman, *Repeal, Replace, and Expose: A Case Study and Call for Public Records Transparency with Police Records in New York*, 52 HOFSTRA L. REV. 677, 677 (2024) (documenting how "[n]umerous recent cases of police brutality and police killings of citizens, often people of color, stopped by police, sometimes police with long records of prior abuses, helped incorporate public scrutiny into the public discussion on police abuses"). The officers who killed George Floyd in Minnesota, Tyre Nichols in Memphis, and Eric Garner in New York all had histories of past misconduct complaints filed against them. *Id.* at 683; *see also* Shaila Dewan & Serge F. Kovaleski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. TIMES (June 8, 2020), https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html [https://perma.cc/C82C-X49D]. When the Black Lives Matter protests drew attention to these and other high-profile examples of police misconduct, activists

led by Communities United for Police Reform, argued that 50-a perpetuated racist policing by hiding which officers were repeat perpetrators of police brutality.[64] After George Floyd's murder, the revelation that numerous complaints had been filed with the Minneapolis Police Department against Officer Derek Chauvin reinforced that shielding misconduct records allowed officials with troubling histories to continue working.[65] In New York, family members of victims of police violence testified at public hearings in favor of repealing 50-a.[66] The mother of Eric Garner, who was killed on Staten Island in 2014 by officers with a history of misconduct, urged lawmakers to "end the law that protects officers who kill our children."[67] Another victim's mother testified that the

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pointed out that CRL 50-a and other disclosure exemptions for police misconduct records had "allowed some officers and law enforcement officials with histories of complaints against them to continue working under a cloak of secrecy." Gutterman, *supra*, at 683.

64. *See* Letter from Cmtys. United for Police Reform to Andrew Cuomo, Governor, State of N.Y. (Jan. 6, 2020), https://www.changethenypd.org/resources/letter-gov-cuomo-support-full-repeal-police-secrecy-law50 [https://perma.cc/6VND-8AFE] (advocating for disclosure of the full misconduct histories of the officers involved in Eric Garner's murder); *see also* Katherine J. Bies, Note, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 123–24 (2017) (recounting the history of 50-a and other police misconduct exemptions, many of which were the result of heavy political lobbying by police unions and arguing that "[t]his disproportionate political power of police unions over the political process in the criminal justice context has generated political outcomes that undermine the democratic values of transparency and accountability").

65. *See* Gutterman, *supra* note 63, at 683 (stating that Derek Chauvin had been the subject of eighteen previous civil rights complaints before murdering George Floyd). As recognition grew that many officers who committed or participated in deadly encounters against citizens had undisclosed histories of complaints that had not affected their employment, scholar Jonathan Abel contended that the idea of "cop tracing" could identify abusive officers by looking at their past misconduct, like the epidemiological concept of "contact tracing" does for infections. Jonathan Abel, *Cop Tracing*, 107 CORN. L. REV. 927, 939–40 (2022) ("When an officer is discredited beyond a certain threshold, cop tracing would require a process for looking backward to identify the old cases that were handled by the officer.").

66. Ryan Tarinelli, *Eric Garner's Mother Urges Repeal of NY Police Secrecy Law*, ASSOCIATED PRESS, (Oct. 17, 2019, at 17:27 ET), https://apnews.com/general-news-80f1fa55d7404089b64304e84f2c8ae9 [https://perma.cc/NQ6P-EXAD]. The hearings included testimony by Gwen Carr, mother of Eric Garner, and Valerie Bell, mother of police shooting victim Sean Bell. *Id.*

67. *Id.* In another hearing, Eric Garner's mother, Gwen Carr, outlined the ways in which Civil Rights Law 50-a had contributed to Eric Garner's death and then shielded Pantaleo and the NYPD from transparency and accountability. She testified:

> Because of 50a, I can't even get the full transcript to the Pantaleo discipline trial. . . .
>
> . . . .
>
> Because of 50a, the public was not aware that before Pantaleo killed my son, he was already the subject of 7 disciplinary complaints and 14 allegations made

repeal is "about public safety" because "hiding this information means that officers who are repeat offenders are allowed to keep their jobs."[68]

The legislature agreed. Pursuant to Senate Bill 8496 (the "50-a Repeal"), the repeal of Civil Rights Law 50-a made law enforcement disciplinary records available for public request under New York's Freedom of Information Law.[69]

2. *Protective Orders over Law Enforcement Records*

After the 50-a Repeal went into effect, federal courts in New York faced the question of whether those same law enforcement disciplinary records—which were no longer exempt from the state FOIL law—still satisfied "good cause" for confidentiality when they were produced as discovery in Section 1983 litigation. However, these protective orders are difficult to challenge due to the S.D.N.Y 1983 Plan and plaintiffs' incentives to agree to stipulated protective orders, creating a landscape of unexamined secrecy.

a. *The S.D.N.Y. 1983 Plan*

In S.D.N.Y., Local Rule 83.10 imposes automatic good cause for protective orders over police disciplinary records.[70] Known as the

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against him to the Civilian Complaint Review Board—"amongst the worst on the force."

. . . .

If Pantaleo had been disciplined the right way earlier, maybe he would not have still been NYPD and maybe my son would be alive today.

Policing: Hearing on S. 3695 Before the S. Standing Comm. on Codes, 203d Leg. (N.Y. 2019) (Statement of Gwen Carr, Mother of Eric Garner), https://www.changethenypd.org/files/docs/gwen_carr_repeal_50-a_testimony_10-24-19.pdf. [https://perma.cc/2QAP-NSWK].

68. Tarinelli, *supra* note 66.

69. Act of June 12, 2020, ch. 96, 2020 N.Y. Sess. Laws 780–81 (McKinney) (codified at N.Y. PUB. OFF. LAW §§ 86, 87, 89). The repeal was subject to extensive litigation after it went into effect, as law enforcement groups brought various challenges to the new FOIL provision's applicability to complaints marked as "unsubstantiated," complaints made prior to the repeal, and complaints whose disclosure would allegedly constitute an invasion of the officer's privacy. *See* Uniformed Fire Officers Ass'n v. de Blasio, 846 F. App'x 25, 30–34 (2d Cir. 2021) (summary order). That litigation has largely concluded, with the Second Circuit holding that FOIL access to officer disciplinary records applies both retroactively and to unsubstantiated complaints. *See id.*

70. S.D.N.Y. CIV. R. 83.10; *see also* S. DIST. OF N.Y., PLAN FOR CERTAIN § 1983 CASES AGAINST THE CITY OF NEW YORK (2013) [hereinafter 1983 PLAN], https://nysd.uscourts.gov/sites/default/files/pdf/1983%20Revised%20Plan%20and%20Exhibits.6.10.14.pdf [https://perma.cc/6QYJ-PPWS].

"1983 Plan," Local Rule 83.10 applies a discovery management program to all cases filed in the S.D.N.Y. that "alleg[e] the use of excessive force, false arrest, or malicious prosecution by an employee of a police department in violation of 42 U.S.C. § 1983."[71] The 1983 Plan was created to reduce the time to disposition in typical Section 1983 cases and to encourage earlier settlement.[72] As such, it requires parties to engage in an initial discovery exchange in which defendants must produce certain personnel records, while plaintiffs produce certain medical records and photos.[73] The Plan's Protective Order then presumptively shields all officer personnel records from being shared outside of the litigation.[74] If parties believe that a document was improperly designated as confidential, they can challenge the designation.[75] Otherwise, the court finds good cause under Rule 26(c) to treat all disciplinary-related records as confidential.[76]

b. *Stipulated Protective Orders*

Plaintiffs in Section 1983 suits face strong incentives to stipulate to defendant officers' proposed protective orders, leading to a dearth of judicial consideration of the effect of state laws on federal protective orders.[77] Protective orders only limit access to third parties outside of the case, so there is little incentive for the parties themselves to challenge or avoid stipulating to a proposed protective order. Civil rights plaintiffs are "one-shotters" in the courts, as players whose interest lies in winning compensation for their injuries, not engaging in expensive litigation over whether the public can look at the discovery already produced in their case.[78] In the language of Marc Galanter's classic essay "Why the 'Haves' Come Out Ahead," these one-shot players have "only occasional recourse to the courts" because they do not expect to

71. S.D.N.Y. CIV. R. 83.10.

72. S.D.N.Y. PILOT § 1983 PLAN WHITE PAPER (2013) [hereinafter 1983 PLAN WHITE PAPER], https://www.nysd.uscourts.gov/sites/default/files/pdf/Section%201983%20Plan%20White%20Paper.pdf [https://perma.cc/TSR2-DDHB].

73. 1983 PLAN, *supra* note 70, ¶ 5.

74. 1983 PLAN, *supra* note 70, at ex. D ¶ 2.

75. *Id.* ¶ 7.

76. *Id.* ¶ 2.

77. *See* Hanlock, *supra* note 4, at 1549, 1558–59.

78. Galanter, *supra* note 8, at 97.

routinely challenge police misconduct.[79] As a result, their incentives all cut towards maximizing settlement and minimizing litigation costs instead of changing the "state of the law" or expanding public knowledge more broadly.[80]

Plaintiff *firms* do have an interest in public transparency that could assist future lawsuits, but these firms usually have to behave as one-shot players because they are bound by their clients' goals.[81] Civil rights practitioners have described the "pressures" of this situation: When a defendant's record of misconduct will be made available to a plaintiff who agrees to a stipulated protective order, it rarely makes sense for any single client to litigate in favor of sharing those records with the public.[82] Moreover, contesting confidentiality designations is a battle that plaintiffs "almost never win[ ]" since judges tend to favor broad protective orders to advance efficiency.[83] Slight modifications to the proposed order may be achievable, but the most frequent outcome is that "whatever you get stays sealed off forever."[84]

Nominally, courts may not grant protective orders over documents *without* good cause under Rule 26(c), even if neither

79. *Id.* At the same time, the narrowing of the standing doctrine has made it more difficult to enjoin police policies in federal court because plaintiffs face a higher bar to show that they will be injured by the challenged policy. In *City of Los Angeles v. Lyons*, the Supreme Court held that a plaintiff who sought injunctive relief against the city police department for injuries sustained from a chokehold lacked standing because he failed to show a likelihood of future injury. 461 U.S. 95 (1983). Following *Lyons*, lower federal courts began denying injunctions against state governments on the grounds that *Lyons* requires a plaintiff to show a sufficient likelihood of future injury in order to have standing to bring an injunctive claim. Ronald T. Gerwatowski, Note, *Standing and Injunctions: The Demise of Public Law Litigation and Other Effects of* Lyons, 25 B.C. L. REV. 765, 767 & n.26; *see, e.g.*, Curtis v. City of New Haven, 726 F.2d 65, 65 (2d Cir. 1984) (denying injunction against police use of mace); Smith v. Montgomery Cnty., 573 F. Supp. 604 (D. Md. 1983) (denying injunctive relief against the County Police for allegedly unconstitutional strip searches); McQurter v. City of Atlanta, 572 F. Supp. 1401, 1423 (N.D. Ga. 1983) (denying injunction against police department's use of chokehold); Stefaniak v. Michigan, 564 F. Supp. 1194, 1199 (W.D. Mich. 1983) (denying injunctive relief against the state police department for alleged police misconduct).

80. Galanter, *supra* note 8, at 97–100 (comparing "one-shotters" to "repeat players" in the courts). Galanter posited that one-shotters in court, such as plaintiffs injured by police misconduct, have a harder time making "good law" in tangential elements of the outcome that might impact subsequent plaintiffs, since the one-shotter's immediate stakes are so high and they have no investment in the outcome of future litigation. *Id.* at 100.

81. Doyle & Brockway, *supra* note 36, at 3.

82. *Id.*

83. *Id.*

84. *Id.*

party contests the order.[85] But in practice, courts are simply unlikely to *sua sponte* deny good cause for documents protected by proposed stipulated orders—doing so would require judges to independently evaluate the merits of confidentiality designations that neither party has challenged, an exercise that busy dockets discourage.[86] And courts are certainly less likely to contend with the wrinkle of a new state law change unless faced directly with a challenge to a contested protective order. As a result—and in conjunction with the permissive text of Rule 26(c)—protective orders have exploded in frequency.[87] In "virtually every case involving significant discovery," parties agree to "umbrella" or "blanket" protective orders that allow parties to designate broad categories of documents as confidential, minimizing costly document-by-document disputes.[88]

Police disciplinary records have followed this phenomenon. In a sample of 595 lawsuits against NYPD officers between 2014 and 2019, stipulated protective orders in nearly every case shielded NYPD employment, disciplinary, training, and policy materials as confidential.[89] In Chelsea Hanlock's sample of stipulated protective orders in civil rights cases against the NYPD, courts had a denied-in-full rate of less than 1% and a denied-in-part rate of 2.9%.[90] The effect is a landscape in which judges have a legal burden to find good cause under Rule 26(c) before granting a

85. *See* FED. R. CIV. P. 26(c); Hanlock, *supra* note 4, at 1515 (noting that courts may not grant protective orders over documents *without* good cause under Rule 26(c), even if neither party contests the order).

86. *See* Ribeiro, *supra* note 18, at 174, 189–90.

87. *Id.* (discussing "ubiquitous umbrella protective orders"); *see also, e.g.*, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 889 (E.D. Pa. 1981) ("We are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order . . . has not been agreed to by the parties and approved by the court.").

88. Ribeiro, *supra* note 18, at 174 (noting that litigants are incentivized to agree to protective orders to minimize costly document-by-document disputes and judicial involvement).

89. *See* Hanlock, *supra* note 4, at 1534, 1549.

90. *Id.* at 1542. This pattern reflects larger trends of judicial acquiescence to stipulated protective orders in litigation. *See* Engstrom et al., *supra* note 14, at 106–07 ("[M]ost provocatively, we show that most judges grant all, or almost all, of the stipulated motions for POs they consider. . . . [W]e find that over half of the judges who considered at least twenty-five stipulated POs in our dataset never denied a single such request."). When parties jointly file motions for protective orders, "many busy and burdened trial court judges simply acquiesce to the parties' request." *Id.* at 105. A novel data set of over 2.2 million federal court docket reports from 2005 to 2014 revealed that most judges nationwide grant almost all stipulated protective orders—likely around 95–97% of the stipulated motions for protective orders that they consider. *Id.* at 106.

protective order over disciplinary records, but they tend to find it without scrutiny unless one party contests the order.

In this context of chronic underexamination of Rule 26(c)'s good cause standard, and without guidance from the Second Circuit about how to apply Rule 26(c), the Southern and Eastern Districts of New York have been deeply divided in their responses to the repeal of Civil Rights Law 50-a.[91] In the S.D.N.Y., governed by the 1983 Plan under Local Rule 83.10, the answer to whether the change in state law should affect the federal protective order inquiry is a firm "no," and the 1983 Plan's blanket grant of good cause remains in effect.[92] The E.D.N.Y., by contrast, is split, with post-2020 decisions that range from full embrace to outright rejection of the S.D.N.Y. position.[93] Part II examines the few challenges to protective orders over law enforcement records that courts have heard since the 50-a Repeal in 2020 and criticizes the S.D.N.Y. commitment to maintaining discovery secrecy.

II. FEDERAL SECRECY AFTER THE 50-A REPEAL

The S.D.N.Y.—governed by Local Rule 83.10[94] and *Elliot v. City of New York*[95]—has continued to shield law enforcement records under Rule 26(c) following the 50-a Repeal, as has one decision in the E.D.N.Y.[96] The two most relevant decisions defending continued secrecy over law enforcement records are *Elliot v. City of New York*[97] and *Fowler-Washington v. City of New York*.[98] Plaintiff Ikeem Fowler-Washington alleged that NYPD officers entered his home while he was sleeping and used excessive physical force, including by striking him with an object that left

91. *Compare* Capellan v. City of New York, 2021 WL 12147771, at *3 (E.D.N.Y. Jan. 7, 2021), *aff'd*, 2021 WL 12147783 (E.D.N.Y. Apr. 9, 2021) ("[I]n the absence of the state protections provided by 50-a, [defendants] bear the burden of persuading this Court that there is some other basis for shielding the officers' records from the public."), *with* Elliot v. City of New York, 2020 WL 6782046, at *6 (S.D.N.Y. Nov. 18, 2020) ("New York's repeal of Section 50-a simply has no bearing on this discovery issue in a federal case based on federal law . . . .").

92. *See* 1983 PLAN, *supra* note 70, at ex. D ¶ 2; *Elliot*, 2020 WL 6782046, at *1 (refusing disclosure of law enforcement disciplinary records after the 50-a Repeal).

93. *See infra* Part II.A.

94. S.D.N.Y. CIV. R. 83.10.

95. *Elliot*, 2020 WL 6782046, at *1.

96. Fowler-Washington v. City of New York, 2020 WL 7237683, at *5 (E.D.N.Y. Dec. 9, 2020).

97. Elliot v. City of New York, 2020 WL 6782046 (S.D.N.Y. Nov. 18, 2020).

98. *Fowler-Washington*, 2020 WL 7237683.

deep gashes.[99] After the 50-a Repeal, Fowler-Washington moved for reconsideration of the protective order over the defendants' disciplinary records.[100] The court denied his motion.[101] In *Elliot*, Dramel Elliot sued New York City and several NYPD officers under Section 1983, alleging false arrest.[102] The officers' disciplinary records were produced in discovery and presumptively designated as confidential under the S.D.N.Y.'s 1983 Plan.[103] Elliot also moved to modify the automatic 1983 Plan Protective Order after the 50-a Repeal, arguing that New York's decision to repeal CRL 50-a effectively nullified the Protective Order's implicit finding of good cause for confidentiality of the records.[104] The court emphatically rejected Elliot's argument that the 50-a Repeal should affect the federal Rule 26(c) analysis.[105]

The non-responsive position expressed in these cases appears to rely on three main justifications to reject the effect of New York's state law change on Rule 26(c). Each justification is flawed. First, these cases justify non-responsiveness to the 50-a Repeal by arguing that the 50-a Repeal is irrelevant because state law changes do not have any effect on the federal protective order standard.[106] But other cases in E.D.N.Y. that encountered Rule 26(c) after the 50-a Repeal suggested that New York courts had previously *deferred* in some way to CRL 50-a when they found good cause for protective orders over police disciplinary records.[107] The 50-a Repeal thus removed a previously dispositive factor (the presumptive confidentiality of the records under state law) from the good cause inquiry, while retaining the judge's discretion to determine whether defendants met that good cause standard for a

99. *Id.* at *1.
100. *Id.*
101. Elliot v. City of New York, 2020 WL 6782046, at *3 (S.D.N.Y. Nov. 18, 2020) (holding that "the repeal of Section 50-a does not allow Plaintiff to publicly share any and all material produced in discovery").
102. 42 U.S.C. § 1983; *Elliot*, 2020 WL 6782046, at *1.
103. *Elliot*, 2020 WL 6782046, at *1; 1983 PLAN, *supra* note 70, at ex. D ¶ 2.
104. *See Elliot*, 2020 WL 6782046, at *1 ("Relying entirely on New York's recent repeal of New York Civil Rights Law Section 50-a, a law that shielded from public disclosure personnel and performance records of police officers, firefighters, and correction officers, Elliot moves to strike defendants' designations of these records as confidential.").
105. *See id.* at *8 (holding that Elliot "fails to present a legally or factually sound basis for setting aside the plain language of the Protective Order and offers no persuasive policy reasons to upset the carefully structured 1983 Plan").
106. *See infra* Part II.A.
107. *See infra* Part II.A.

protective order.[108] The second justification for "good cause" post–50-a Repeal is that FOIL privacy exemptions continue to mandate discovery confidentiality.[109] But courts can effectively mitigate this concern by ordering privacy redactions to align discovery access with the FOIL exemptions.[110] Third, the non-responsive courts argue that access under FOIL serves as a procedural backstop for plaintiffs who want to share materials publicly.[111] But New York's FOIL faces extensive burdens and delays.[112] The reality of challenges with FOIL access undermines this argument in practice and in principle.[113] Each of these reasons is discussed and rebutted in detail below.

A. STATE INFLUENCES; FEDERAL STANDARDS

The dominant thrust of the non-responsive position is that Rule 26(c)'s federal "good cause" inquiry is entirely indifferent to state law. As put forth in *Elliot*, "New York's repeal of Section 50-a simply has no bearing on this discovery issue in a federal case based on federal law and governed by a valid court order."[114] Good cause is whatever federal judges determine it to be, governed only by federal guidance from circuit courts—guidance that does not exist in the Second Circuit.[115] *Fowler-Washington* echoed this distinction, stating that the 50-a Repeal does not govern "litigants' obligations under the Federal Rules of Civil Procedure."[116] According to this theory, Civil Rights Law 50-a—its existence or its repeal—did not ever affect findings of good cause for confidentiality, before or after 2020.[117] *Elliot* recounted that 50-a itself "never 'govern[ed] discovery in federal cases' nor 'b[ound]

108. *See infra* Part II.A.
109. *See infra* Part II.B.
110. *See infra* Part II.B.
111. *See infra* Part II.C.
112. *See infra* Part II.C.
113. *See infra* Part II.C.
114. Elliot v. City of New York, 2020 WL 6782046, at *6 (S.D.N.Y. Nov. 18, 2020).
115. *See* Haidon v. Town of Bloomfield, 552 F. Supp. 3d 265, 269 (D. Conn. 2021) ("At least in this Circuit, district courts have not fully settled on a test for evaluating what may amount to 'good cause' under Rule 26(c)."); *see also* Schoolcraft v. City of New York, 2013 WL 4534913, at *3 (S.D.N.Y. Aug. 27, 2013) (stating that "[t]here is a split within the district courts of this Circuit as to the showing necessary to establish that good cause exists" and noting that "the Second Circuit has not directly addressed this matter").
116. Fowler-Washington v. City of New York, 2020 WL 7237683, at *3 (E.D.N.Y. Dec. 9, 2020).
117. *See id.* at *3 (drawing a distinction between the state FOIL law and the federal protective order rules).

federal courts considering actions brought pursuant to federal civil rights laws like § 1983.'"[118] The court thus discounted the 50-a *repeal* as similarly irrelevant to the Rule 26(c) analysis, finding that it "does not . . . exempt the NYPD Disciplinary Records from the Order's reach."[119]

The S.D.N.Y. Rules Committee relied on this strict distinction between the federal interpretation of Rule 26(c) in federal court and New York state FOIL laws when the S.D.N.Y. Civil Rights Committee petitioned to amend Local Rule 83.10 after the 50-a Repeal.[120] The Civil Rights Committee argued that the state's new presumption of transparency over police disciplinary records "necessitated" striking the 1983 Plan's presumptive good cause for including the records in its automatic protective order.[121] "In light of the now-public availability of law enforcement disciplinary records that Local Rule 83.10 presently treats as confidential," the petition requested that the Rules Committee amend Local Rule 83.10 to remove all records that "relate to [NYPD] disciplinary-related records or records of investigations" from the automatic protective order.[122]

Chief Judge Colleen McMahon and Rules Committee Chair Judge Naomi Reice Buchwald rejected the Civil Rights Committee's petition in a brief letter that underscored the exclusively federal influences they considered in a federal protective order inquiry.[123] If individual plaintiffs challenged applying the presumptive protective order over police disciplinary records, they responded, then "those issues should be resolved by the application of federal law."[124] As such, Local Rule 83.10's presumptive shield over disciplinary records survived the 50-a Repeal.

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118. *Elliot*, 2020 WL 6782046, at *6 (quoting Moore v. City of New York, 2012 WL 2190551, at *2 (S.D.N.Y. June 15, 2012)).

119. Elliot v. City of New York, 2020 WL 6782046, at *6 (S.D.N.Y. Nov. 18, 2020).

120. Letter from Hon. Naomi Reice Buchwald, Chair, S.D.N.Y. Rules Comm., to the C.R. Comm. of the Fed. Bar Ass'n for the S. Dist. (Aug. 6, 2020).

121. Letter from the C.R. Comm. of the Fed. Bar Ass'n for the S. Dist. of N.Y. to Hon. Naomi Reice Buchwald, Chair, S.D.N.Y. Rules Comm. 1 (July 13, 2020) [hereinafter Letter, C.R. Comm.].

122. *Id.* at 2–3 ("The removal of the confidentiality designation from the Local Rule 83.10 protective order should also be applied retroactively to every confidentiality designation that has ever been made of disciplinary records under the Plan protective order . . . .").

123. Letter from Hon. Naomi Reice Buchwald, Chair, S.D.N.Y. Rules Comm., to the C.R. Comm. of the Fed. Bar Ass'n for the S. Dist. (Aug. 6, 2020).

124. *Id.*

Judge Buchwald expanded on this decision in her opinion in *Elliot*, where she emphasized the federal character of the 1983 Plan, which had incorporated Rule 26(c)'s good cause inquiry.[125] CRL 50-a had governed essentially the same thing as Rule 26(c): Both shielded the same NYPD disciplinary records from disclosure to the public.[126] But Judge Buchwald suggested that the content of the state law did not matter, because "cases brought in federal court and grounded in federal law are governed by federal rules."[127] Consistent with that principle, CRL 50-a, like any other state law, simply fell outside the scope of influences that could have ever affected Local Rule 83.10.[128] Accordingly, she declared that "the 1983 Plan, and specifically the confidentiality provisions included in its Protective Order, neither reference nor was predicated on Section 50-a."[129] The 1983 Plan "was never linked to the scope or existence of Section 50-a" and it "never . . . incorporated, or otherwise adopted Section 50-a."[130] Rather, independent of state influences, "the judges of this District determined that good cause exists for treating NYPD personnel and disciplinary records produced in 1983 Plan cases as confidential."[131] S.D.N.Y. judges, in this view, did not respond to 50-a and so need not respond to its repeal.[132]

But three civil rights cases from the E.D.N.Y. (written by three different judges) articulate an opposite approach, reasserting the relationship between the Federal Rules of Civil Procedure and state transparency laws. The 50-a Repeal, according to *Walls v. City of New York*,[133] *Mingo v. City of New York*,[134] and *Capellan v.*

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125. Elliot v. City of New York, 2020 WL 6782046, at *1 (S.D.N.Y. Nov. 18, 2020); *see also* FED. R. CIV. P. 26(c); S.D.N.Y. CIV. R. 83.10.

126. FED. R. CIV. P. 26(c); N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2020), *repealed by* Act of June 12, 2020, ch. 96, 2020 N.Y. Sess. Laws 780–81 (McKinney); S.D.N.Y. CIV. R. 83.10.

127. *Elliot*, 2020 WL 6782046, at *1.

128. *Id.*

129. *Id.*

130. Elliot v. City of New York, 2020 WL 6782046, at *5 (S.D.N.Y. Nov. 18, 2020).

131. *Id.* Judge Buchwald reiterated that "[i]nstead, after obtaining the views of the bar, it was the considered judgment of the judges of this District in adopting Local Rule 83.10 that good cause exists independent of Section 50-a for the provisions of the Protective Order, including the specific treatment of NYPD personnel and disciplinary records as confidential." *Id.*

132. *See id.* "Because New York's repeal of Section 50-a has no effect on the scope and applicability of that Order," Judge Buchwald held, "Elliot's motion is meritless." *Id.* at *1.

133. 502 F. Supp. 3d 686 (E.D.N.Y. 2020).

134. 2020 WL 7085359 (E.D.N.Y. Dec. 3, 2020).

City of New York,[135] suggests that public transparency now outweighs generalized police privacy interests.[136] *Walls* involved allegations that an NYPD officer forcefully occupied and searched the home of grandmother Rolinda Walls for sixteen hours while she was unlawfully detained.[137] *Mingo* similarly raised a false arrest claim under Section 1983, as well as a *Monell* claim against the city.[138] In *Capellan*, plaintiffs alleged that the defendant NYPD officers executed a no-knock warrant around 5:00 am, waking the plaintiffs by pointing firearms at them and handcuffing them while officers "ransacked" the Brooklyn residence, destroying property.[139] The officers did not recover any contraband and the target of the raid was not present during the search.[140]

These E.D.N.Y. cases explicitly acknowledged their divergence from the S.D.N.Y.'s non-responsive position. *Mingo* and *Walls* both noted that the S.D.N.Y. 1983 Plan did not control discovery disputes in the E.D.N.Y. before declining defendants' additional requests for a new protective order over misconduct records.[141] *Capellan* also raised the fact that the S.D.N.Y. Rules Committee had rejected the request to strike the automatic confidentiality of police disciplinary records from the 1983 Plan protective order.[142] But given that "the Second Circuit has yet to speak on the issue," *Capellan* exercised its discretion to diverge from the S.D.N.Y.[143] In each case, the E.D.N.Y. declined to find good cause to grant protective orders over the defendants' misconduct records after the 50-a Repeal, allowing the plaintiffs to share the records outside the confines of the litigation.

These E.D.N.Y. cases invoked the need for a symmetrical approach; that is, treating the 50-a Repeal the same as 50-a

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135. 2021 WL 12147771 (E.D.N.Y. Jan. 7, 2021), *aff'd*, 2021 WL 12147783 (E.D.N.Y. Apr. 9, 2021).

136. *See infra* Part III.A.

137. *Walls*, 502 F. Supp. 3d at 690.

138. *Mingo*, 2020 WL 7085359, at *1.

139. *Capellan*, 2021 WL 12147771, at *1.

140. Capellan v. City of New York, 2021 WL 12147771, at *1 (E.D.N.Y. Jan. 7, 2021), *aff'd*, 2021 WL 12147783 (E.D.N.Y. Apr. 9, 2021).

141. *See* Mingo v. City of New York, 2020 WL 7085359, at *2 (E.D.N.Y. Dec. 3, 2020) ("The Court does not find the [S.D.N.Y. 1983 Plan] to control discovery disputes in this District."); *Walls* v. City of New York, 502 F. Supp. 3d 686, 695 n.7 (E.D.N.Y. 2020) ("[T]he S.D.N.Y. Plan does not control here.").

142. *See Capellan*, 2021 WL 12147771, at *3 (citing Letter from Hon. Naomi Reice Buchwald, Chair, S.D.N.Y. Rules Comm., to the C.R. Comm. of the Fed. Bar Ass'n for the S. Dist. (Aug. 6, 2020)).

143. *Id.*

itself.[144] Symmetry demands that the 50-a Repeal make it harder for officers to establish good cause for protective orders over disciplinary records because Civil Rights Law 50-a, while in effect, had made it *easier* to establish good cause for such secrecy. In *Mingo*, for instance, defendant officers requested confidentiality under Rule 26(c) by "argu[ing] that courts' willingness to issue such orders in the past demonstrates good cause."[145] The court "disagree[d] because the orders cited by Defendants predate . . . the repeal of New York Civil Rights Law § 50-a."[146] "[P]rior to that date," *Mingo* recounted, "state law provided that police officer personnel records should be considered confidential, and *federal courts often acknowledged the state law confidentiality provisions*."[147] Similarly, *Capellan* recalled that "[p]rior to its repeal, the City and police officers routinely cited the privacy interests protected by Section 50-a as a basis for resisting disclosure of police disciplinary records or urging redactions in records produced in 1983 civil rights cases."[148]

The pre-Repeal case law confirms this characterization of CRL 50-a justifying federal protective orders while it was in effect. In *Collado v. City of New York*, the City "allude[d]" to 50-a as a basis for characterizing the defendant's misconduct records as confidential.[149] And in *Smalls v. Fallon*, defendants made an

144. Symmetry—at its core, treating one thing the same way as its opposite—is widely invoked in jurisprudence as a principle of neutrality in decision making. In constitutional law, Zachary Price has advocated for "symmetric constitutionalism," a "judicial ethos" that prioritizes "confer[ring] valuable protections across both sides of the nation's major political divides." Zachary S. Price, *Symmetric Constitutionalism: A Judicial Ethos for Polarized Times*, L. & LIBERTY (May 9, 2019), https://lawliberty.org/symmetric-constitutionalism-a-judicial-ethos-for-polarized-times/ [https://perma.cc/X6EK-98V4]. In antidiscrimination law, "[t]he symmetry principle mandates that once certain attributes or characteristics are identified as worthy of antidiscrimination protection, all groups within that universal ground must be protected." Bradley A. Areheart, *The Symmetry Principle*, 58 B.C. L. REV 1085, 1088, 1089 n.12 (discussing recent scholarship on the strengths and weaknesses of symmetrical discrimination laws). Here, this Note argues that one principled way for courts to resolve the tension between the state 50-a repeal and federal protective orders is to treat the *repeal* of 50-a symmetrically to its pre-repeal effect. This neutral symmetry approach also aligns in this case with policy values in favor of disclosure and transparency.

145. *Mingo*, 2020 WL 7085359, at *2.

146. Mingo v. City of New York, 2020 WL 7085359, at *2 (E.D.N.Y. Dec. 3, 2020).

147. *Id.* (emphasis added).

148. Capellan v. City of New York, 2021 WL 12147771, at *3 (E.D.N.Y. Jan. 7, 2021), *aff'd*, 2021 WL 12147783 (E.D.N.Y. Apr. 9, 2021). Walls v. City of New York, 502 F. Supp. 3d 686, 696 (E.D.N.Y. 2020) also recounted that "prior to § 50-a's repeal, the Corporation Counsel of the City of New York (Defendants' counsel here) argued that police officers' privacy interests previously protected by § 50-a were a factor to be considered in discovery disputes between federal civil rights litigants over police personnel information."

149. Collado v. City of New York, 193 F. Supp. 3d 286, 290 (S.D.N.Y. 2016).

"invocation" of 50-a to argue against disclosure.[150] Moreover, the court in *Walls* had ordered the parties' stipulated protective order over disciplinary records in January 2020, while CRL 50-a was in effect.[151] But when 50-a was repealed, the court responded accordingly, ordering the defendants to produce unredacted records.[152] The court explained that it had "so-ordered the Confidentiality Order in part based upon a statute then in force—New York Civil Rights Law Section 50-a—which provided that police officer personnel records would be considered confidential."[153] The 50-a Repeal removed this basis for good cause and without it, "Defendants had not shown any basis to redact the requested misconduct summaries in light of Section 50-a's repeal or on the grounds of any other argued privilege."[154] Symmetry demands accordance between the existence and the repeal of Civil Rights Law 50-a.[155]

Accordingly, *Capellan* emphasized that the 50-a Repeal signified a vindication of the public's interest in the good cause analysis. With the 50-a Repeal, the basis for confidentiality under state law "now has been explicitly revoked by the state legislature, which clearly determined that public transparency in police officers' histories was paramount to any interest they may have had in confidentiality."[156] Without that "basis for confidentiality," officers now face a higher bar to establish good cause for secrecy under Rule 26(c).[157]

As a result, good cause for a protective order over misconduct records requires an additional, particularized reason *beyond* what was sufficient while 50-a was in effect.[158] The defendants in *Capellan* failed to meet this higher bar.[159] As *Capellan* explained,

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150. Smalls v. Fallon, 1995 WL 5847, at *13 (S.D.N.Y. Jan. 5, 1995).

151. *See* Walls v. City of New York, 2021 WL 1812634, at *1 (E.D.N.Y. May 6, 2021) (summarizing the procedural history of the parties' protective order).

152. *See Walls*, 502 F. Supp. 3d at 699–700 (granting Plaintiffs' motion to compel Defendants to produce unredacted (except for personal information) misconduct summaries).

153. *Walls*, 2021 WL 1812634, at *1.

154. *Id.* at *2.

155. *See supra* note 144 (discussing jurisprudential symmetry).

156. Capellan v. City of New York, 2021 WL 12147771, at *3 (E.D.N.Y. Jan. 7, 2021), *aff'd*, 2021 WL 12147783 (E.D.N.Y. Apr. 9, 2021).

157. *Id.* ("In light of the repeal of section 50-a, there is no longer a statutory provision protecting officers' records that would justify overriding the interests of the public in disclosure in the context of a federal civil rights case.").

158. *Id.*

159. *Id.*

"Defendants fail to acknowledge that in the absence of the state protections provided by 50-a, they bear the burden of persuading this Court that there is *some other basis* for shielding the officers' records from the public."[160] And in *Walls*, the plaintiffs argued—and the defendants conceded—that the 50-a Repeal meant that "[d]efendants can no longer cite to that law to justify their redaction of the contested information."[161] The court ordered defendants to produce the unredacted misconduct summaries in part "because § 50-a's repeal has arguably rendered information similar to what would appear on the full, unredacted . . . summaries publicly available through [FOIL] requests," negating good cause for secrecy.[162]

Responsiveness to the 50-a Repeal did not abdicate the federal Rule 26(c) analysis to state law. Rather, it removed a previously dispositive factor (the presumptive confidentiality of the records under state law) from the good cause analysis while retaining the judge's discretion to determine whether defendants met that good cause standard for a protective order. Without correspondingly higher risks of harm from disclosure than was sufficient before the 50-a Repeal, the officers did not satisfy Rule 26(c)'s standard.[163]

B. PRIVACY EXEMPTIONS

The second major argument advanced by cases that are non-responsive to the 50-a repeal is that statutory privacy exemptions under FOIL create a mismatch between information available to plaintiffs in discovery and available to the public under FOIL after the 50-a Repeal.[164] The 50-a Repeal lifted the shield that prevented police disciplinary records from being funneled through the FOIL system, but it did not affirmatively designate the records for disclosure.[165] Police disciplinary records now have a

160. *Id.* (emphasis added).
161. Walls v. City of New York, 502 F. Supp. 3d 686, 696–97 (E.D.N.Y. 2020).
162. *Id.* at 164.
163. *Id.*
164. N.Y. PUB. OFF. LAW § 89(2)(b) (McKinney 2025); Act of June 12, 2020, ch. 96, 2020 N.Y. Sess. Laws 780–81 (McKinney) (codified at N.Y. PUB. OFF. LAW §§ 86, 87, 89). FOIL contains statutory privacy exemptions for records constituting an "unwarranted invasion of personal privacy," including things like employment and medical histories and personal contact information. N.Y. PUB. OFF. LAW § 89(2)(b)(i)–(viii).
165. *See* Act of June 12, 2020, ch. 96, § 3, 2020 N.Y. Sess. Laws 780, 781 (McKinney) (codified at N.Y. PUB. OFF. LAW §§ 86, 87, 89) ("A law enforcement agency responding to a request for law enforcement disciplinary records as defined in section eighty-six of this

presumption of transparency, but that presumption can be overcome by other statutory FOIL exemptions that protect certain categories of information—namely personal contact information and medical histories—from disclosure.[166] These categories are redacted from materials produced under FOIL and can be redacted from public discovery as well.

Because FOIL's statutory exemptions "do not apply to discovery materials produced under the 1983 Plan," the court in *Elliot* held that the records available under FOIL and the records covered by the 1983 Plan Protective Order "are not coterminous."[167] *Fowler-Washington* raised the same point, explaining that "Plaintiff is likely entitled to discovery of more records than the public might be able to access through a [FOIL] request," since records produced in discovery under Rule 26(b) might include information that is statutorily exempt from FOIL.[168] The scope of materials produced to plaintiffs, *Fowler-Washington* stated, is likely broader than that available to non-litigants under FOIL, allowing plaintiffs to "access . . . more documents than [they] would as a member of the public, even after the repeal of Section 50-a."[169]

When records produced in discovery include information that would be subject to FOIL's statutory exemptions, courts can permit defendants to redact information that would exceed FOIL access.[170] But this additional step implicates a related dispute about discovery efficiency. The purpose of the automatic Protective Order in the 1983 Plan was to expedite discovery.[171] Accordance with FOIL would undermine that goal, according to

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article shall redact any portion of such record containing the information specified in subdivision two-b of section eighty-nine of this article prior to disclosing such record under this article.").

166. *See* N.Y. PUB. OFF. LAW § 89(2)(b) (barring "employment, medical or credit histories" and personal contact information, such as email addresses, from disclosure).

167. Elliot v. City of New York, 2020 WL 6782046, at *7 (S.D.N.Y. Nov. 18, 2020) (contending that a mismatch exists between information "available under FOIL following the repeal of Section 50-a and the NYPD disciplinary and personnel records covered by Protective Order Section 2(a)").

168. Fowler-Washington v. City of New York, 2020 WL 7237683, at *3 (E.D.N.Y. Dec. 9, 2020) ("[W]hile New York's repeal of Section 50-a allows the public to access certain NYPD records in the context of a Freedom of Information Law request, sensitive portions of those records are still not subject to public disclosure.").

169. *Id.*

170. *See* Walls v. City of New York, 502 F. Supp. 3d 686, 699 (E.D.N.Y. 2020) (allowing redactions).

171. *See* 1983 PLAN WHITE PAPER, *supra* note 72 (explaining that the S.D.N.Y. promulgated the 1983 Plan "to promote the just, speedy and inexpensive resolution of civil cases in this District").

the S.D.N.Y. analysis, because the privacy exemptions in FOIL would require the defendants and the court to undertake their own time-consuming FOIL analysis before determining whether the given information satisfied good cause under Rule 26(c).[172] As such, the fact that "portions of some documents marked as confidential in 1983 Plan cases may also be publicly available is not reason enough to graft onto the 1983 Plan a process under which the City must painstakingly determine what is or is not disclosable in each document under FOIL before applying confidentiality designations."[173] This step would "subvert the Protective Order's role in expediting the resolution of 1983 Plan cases."[174]

But *Elliot*'s conclusion that accordance with FOIL would subvert discovery efficiency is not uncontested.[175] The petition to amend Local Rule 83.10 argued that privacy redactions are not truly so burdensome.[176] Some post-Repeal cases in the E.D.N.Y. bear this out, finding that personal privacy redactions coexist easily with disclosure of police misconduct records. *Capellan v. City of New York* simply "order[ed] the defendants to redact any such personal information that falls within these categories"; "[o]therwise," the court "finds no basis to include these disciplinary records in the Protective Order."[177] Even one case in the S.D.N.Y. has now taken that approach. In *Gonzalez v. City of New York*, Judge Liman "made a considered decision that the case should be not subject to the § 1983 Plan and thus that it should be treated comparably to cases filed in the Eastern District of New York, which has no such plan."[178] Citing *Capellan*, Judge Liman ordered

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172. *See* Elliot v. City of New York, 2020 WL 6782046, at *7 (S.D.N.Y. Nov. 18, 2020) (warning that requiring defendants to make information that is public under FOIL available for plaintiffs to distribute would mean that the "[c]ity must painstakingly determine what is or is not disclosable in each document under FOIL before applying confidentiality designations and producing them to plaintiffs").

173. *Id.*

174. *Id.*

175. See Letter, C.R. Comm., *supra* note 121, at 4.

176. *Id.* at 2. Even the petitioners suggested clarifying that "home addresses, dates of birth, social security numbers, and medical information . . . shall be redacted in any public filing or other dissemination to members of the public of NYPD disciplinary-related records." *Id.*

177. Capellan v. City of New York, 2021 WL 12147771, at *4 (E.D.N.Y. Jan. 7, 2021), *aff'd*, 2021 WL 12147783 (E.D.N.Y. Apr. 9, 2021). *See also* Walls v. City of New York, 502 F. Supp. 3d 686, 699–700 (E.D.N.Y. 2020) (ordering production of unredacted misconduct summaries but "permitt[ing]" the "redaction of limited private police officer information" such as "social security numbers [and] home addresses").

178. Gonzalez v. City of New York, 2025 WL 2926866, at *3 (S.D.N.Y. Oct. 15, 2025).

defendants to redact all information that would be statutorily exempt under FOIL.[179] But outside of those enumerated redactions, "Defendants may not categorically treat personnel and disciplinary records as confidential."[180]

By diverging from the 1983 Plan and permitting open discovery with limited redactions, *Gonzalez* may also represent one example of what the Civil Rights Committee warned was the *actual* threat to efficient discovery.[181] The 1983 Plan could not be justified by administrative efficiency after the 50-a Repeal, the petition warned, because any gains would be offset by challenges to the Plan's automatic protective order in individual cases after the Repeal, which would "defeat the efficiency-related purposes of Local Rule 83.10."[182]

C. FOIL ACCESS

The last major argument that police disciplinary records still satisfy good cause for automatic protective orders is that the 50-a Repeal makes the point moot because interested parties can simply access the records under FOIL if they want to use them publicly. *Elliot* stated that "in cases governed by the 1983 Plan, the Protective Order by its own terms does not impede anyone from obtaining records under FOIL."[183] The 50-a Repeal makes public access to discovery *less* important, not more, according to this logic, because "notwithstanding the Protective Order, anyone—including Elliot and his counsel—can use FOIL to request materials that are now publicly available because of Section 50-a's repeal and then disseminate the public versions of those records as they please."[184]

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179. *Id.* at *4–5 ("Defendants may redact that information which is exempt from disclosure under New York Public Officers Law § 89(2-b), such as information protected by that section regarding medical history, home addresses, personal telephone numbers and personal emails, social security numbers, and the use of an employee assistance program, mental health service, or substance abuse assistance service." (citing N.Y. PUB. OFF. LAW § 89(2-b)(a)–(d))).

180. *Id.* at *5.

181. *Id.*; Letter, C.R. Comm., *supra* note 121, at 4.

182. *See* Letter, C.R. Comm., *supra* note 121, at 4 (arguing that frequent disputes would "be a waste of the resources of both the Court and counsel for the parties"); 1983 PLAN, *supra* note 70, at ex. D ¶ 7 (providing a mechanism for parties or third-party intervenors to challenge confidentiality designations in 1983 Plan cases).

183. Elliot v. City of New York, 2020 WL 6782046, at *6 (S.D.N.Y. Nov. 18, 2020).

184. *Elliot*, 2020 WL 6782046, at *6.

Fowler-Washington suggested that FOIL could operate as a procedural backstop to the court's decision by sunsetting the protective order when the plaintiff actually *receives* the disciplinary records through FOIL.[185] The discovery will thus *become* public, removing good cause under Rule 26(c) if the litigants successfully access the records from the state. This lowers the stakes for the court to decide whether the 50-a Repeal precludes secrecy because "if Plaintiff is correct that all of the relevant records should now be public following the repeal of Section 50-a, he may obtain them through New York's process for obtaining such records, and they will no longer be considered confidential under the protective order."[186]

Judge Buchwald suggested an even more rigorous division between the federal good cause inquiry and the state FOIL analysis for the S.D.N.Y. in *Elliot*. Rather than changing the federal good cause finding upon FOIL access, *Elliot* indicated that FOIL access simply introduced multiplicity, generating a separate and unrelated state "version[ ]" of the records.[187] Litigants who successfully accessed the records through FOIL would then have multiple "versions" of the same disciplinary records: "[p]ublic versions" from the state of New York that the litigants can "obtain . . . under FOIL and then distribute," and secret versions produced in discovery in federal litigation that continue to be shielded under Rule 26(c).[188] This argument that FOIL renders federal discovery access unnecessary rests on the premise that the state and federal inquiries are so distinct that state transparency can not only coexist with federal Rule 26(c) secrecy but can even justify it.

However, public access to disciplinary records produced in civil rights lawsuits is indeed important—and not rendered moot by the state presumption of transparency—because New York's FOIL system is deeply overburdened in practice. In the years since the 50-a Repeal began to allow citizens to request disciplinary records under FOIL, noncompliance in staffing and timing have hindered

185. Fowler-Washington v. City of New York, 2020 WL 7237683, at *4 (E.D.N.Y. Dec. 9, 2020).

186. *Id.*

187. *See Elliot*, 2020 WL 6782046, at *6–7 (stating that the 1983 Plan's protective order does not stop Elliot from "us[ing] FOIL to request materials that are now publicly available because of Section 50-a's repeal and then disseminat[ing] the public versions").

188. Elliot v. City of N.Y., 2020 WL 6782046, at *6–7 (S.D.N.Y. Nov. 18, 2020).

the public's ability to successfully access such records.[189] Given the "politics of implementation" of passive freedom of information laws, FOIL compliance is heavily dependent on staffing and funding at the Civilian Complaint Review Board (CCRB), the custodian of the NYPD disciplinary records.[190] But after the 50-a Repeal went into effect, the City cut the CCRB's budget.[191] By February 2023, the CCRB fell below the City Charter's mandate that it have a headcount equivalent to at least 0.65% of the Police Department's uniform headcount.[192] In 2024, the Chair of the CCRB testified that "[i]n order to fulfill FOIL requests in the timely manner that the Freedom of Information Law intended, the CCRB needs several more staff members working to redact and publicize our documents."[193] Earlier that year, the CCRB had been forced to go down to a single Records Access Officer.[194]

This understaffing has caused serious noncompliance and delays in FOIL access. Since the Repeal, police disciplinary records are subject to FOIL's time limits, which give agencies five business days to acknowledge requests and respond with a "date certain" for disclosure.[195] But a project to request police disciplinary records in the first year after the 50-a Repeal found that only about 10% of New York police departments fulfilled requests within six months.[196] Nearly 20% of the departments

189. N.Y.C. COUNCIL, NEW YORK CITY COUNCIL'S RESPONSE TO THE FISCAL 2024 PRELIMINARY BUDGET AND FISCAL 2023 PRELIMINARY MAYOR'S MANAGEMENT REPORT 26 (2023), https://council.nyc.gov/wp-content/uploads/2023/04/Fiscal-2024-Preliminary-Budget-Response.pdf [https://perma.cc/B8L7-36HL].

190. Jennifer L. Selin & Jordan M. Butcher, *How Free Is Information? Transparency in State Government*, 26 N.Y.U. J. LEGIS. & PUB. POL'Y 985, 990 (2024) (positing that "agency-level factors such as administrative function" have a higher correlation with FOI request fulfillment than the "stringency of state law"); *see also About the CCRB*, NYC.GOV, https://www.nyc.gov/site/ccrb/about/about.page [https://perma.cc/MAW8-UPU3] (last visited June 9, 2026).

191. *See* Christopher Werth, *Adams Cuts Police Oversight Agency's Budget by 3%, Among Other City Agencies*, GOTHAMIST (Jan. 13, 2022), https://gothamist.com/news/adams-cuts-police-oversight-agencys-budget-by-3-among-other-city-agencies [https://perma.cc/U37X-6WMT].

192. N.Y.C. COUNCIL, *supra* note 189, at 26.

193. *Fiscal 2025 Preliminary Budget: Hearing Before the Comm. on Pub. Safety*, 2024 Council 225 (N.Y.C. 2024) (statement of Arva Rice, Interim Chair, Civilian Complaint Rev. Bd.).

194. *Id.*

195. N.Y. PUB. OFF. LAW § 89(3)(a) (McKinney 2025).

196. Beryl Lipton & Jon Campbell, *Six Months After the Repeal of 50-a, NY Police Continue to Combat the Release of Disciplinary Records*, MUCKROCK (Dec. 22, 2020), https://www.muckrock.com/news/archives/2020/dec/22/six-months-after-50-a-police-still-delay-records/ (on file with the *Columbia Journal of Law & Social Problems*).

failed to acknowledge the requests at all within six months, blowing past the statutory five-day requirement even with numerous follow-up inquiries.[197] Almost the same percentage of departments claimed to have no records to disclose at all.[198]

Litigants have confirmed these findings. In 2020, NYPD officers assaulted Patricia Rodney at the 62nd Precinct, where she went to file a police report.[199] Body camera footage showed the officers pushing Rodney to the ground and twisting her arms, fracturing her elbow.[200] Rodney filed suit.[201] While the parties litigated discovery, her attorneys submitted FOIL requests for the disciplinary history of each named officer.[202] The CCRB timely acknowledged the request but advised that it would take over a year to disclose the records because it "currently only has one Records Access Officer and has been unable to hire additional FOIL staff due to the city-wide budget cuts," creating "an extreme backlog."[203]

Recent statutory amendments further burdened the FOIL process for police disciplinary records, underscoring the distinction between a presumption of transparency and actual access. In September 2024, Governor Hochul signed legislation requiring agencies to inform public employees if their disciplinary records have been requested.[204] Advocates of open government warned that this new administrative burden would "needlessly delay" the disclosure of disciplinary records by creating more work for already

197. *Id.* Police departments in Poughkeepsie and several other cities also repeatedly pushed back the date by which they would fulfill the request, sometimes for months at a time, while those in Manlius and Yonkers "requested thousands of dollars to sort through and redact the records[.]" *Id.*

198. *See id.* (noting that, of "more than 400 police agencies" in the study, over 75 claimed to have no disciplinary records and about 80 did not respond at all within six months).

199. Spectrum News Staff, *Officers Broke Woman's Elbow in Arrest at Brooklyn Precinct: Suit*, SPECTRUM NEWS NY1 (May 12, 2022), https://ny1.com/nyc/all-boroughs/news/2022/05/12/nypd-broke-woman-s-elbow-in-arrest-at-brooklyn-precinct-lawsuit [https://perma.cc/ST94-74C2].

200. *Id.*

201. Verified Petition at 6, Cohen&Green P.L.L.C. v. New York City Civilian Complaint Rev. Bd., No. 158551/2024 (N.Y. Sup. Ct. Sep. 16, 2024).

202. *Id.*

203. *Id.*

204. Act of Sep. 4, 2024, ch. 302, 2024 N.Y. Sess. Laws 859 (McKinney) (codified at N.Y. PUB. OFF. LAW §§ 86, 87, 89); Robert Harding, *N.Y. COs to Be Notified of Disciplinary Record Requests Under New Law*, CORRECTIONS 1 (Sep. 9, 2024), https://www.corrections1.com/legal/n-y-cos-to-be-notified-of-disciplinary-record-requests-under-new-law [https://perma.cc/H4V8-9462].

"overwhelmed" FOIL staff.[205] Although there has been little data available to empirically measure its effects, requests for records of potentially large groups of employees during a certain period (as sought for systemic *Monell* litigation)[206]—have likely been most affected, since agencies must now notify potentially hundreds of current and former employees.[207] Open-government organizations also raised the specter of a chilling effect resulting from hesitancy to request records if officers are directly notified of the request.[208] FOIL advocates denounced the amendment as "anti-transparency" and a "ten-ton weight" on "the FOIL camel's back" that "rolls back" the accountability gains of the 50-a Repeal.[209]

Ultimately, the argument that FOIL serves as an adequate procedural backstop for public access ignores the reality of government transparency in practice. While the *Elliot* court suggested that plaintiffs can simply use FOIL to disseminate records, this ignores the systemic delays and administrative hurdles that often make FOIL requests a multi-year endeavor.[210] By the time a FOIL request is fulfilled, the litigation—and the peak moment of public interest in the misconduct at issue—has often passed.[211] Using FOIL as a justification for federal secrecy requires citizens to litigate twice for records that have already been produced in federal court. As the E.D.N.Y. courts have recognized, federal discovery should not operate in a vacuum that ignores these practical barriers, especially when the state legislature has already signaled that the era of categorical police secrecy is over.

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205. Memorandum from Reinvent Albany et al. to Kathy Hochul, Governor, State of N.Y. (Sep. 3, 2024), https://reinventalbany.org/wp-content/uploads/2024/09/Group-Memo-of-Opposition-to-S5500-B-Skoufis-_-A6146-B-Buttenschon-Requires-government-agencies-to-notify-public-employees-whose-disciplinary-record-is-disclosed-under-FOIL-September-2024.pdf [https://perma.cc/K74H-N9YE]; Seth Stern, *NY Law Will Needlessly Delay Release of Public Records*, FREEDOM OF THE PRESS FOUND. (Sep. 6, 2024), https://freedom.press/issues/ny-law-will-needlessly-delay-release-of-public-records/ [https://perma.cc/VDZ4-U6SQ].

206. *See supra* Part I.B.1.a. (discussing how records of many employees could show a pattern or practice sufficient to support a *Monell* claim).

207. *New Law Sabotages Police Accountability Gains from Landmark Repeal of 50-a*, REINVENT ALBANY (Sep. 5, 2024), https://reinventalbany.org/2024/09/new-law-sabotages-police-accountability-gains-from-landmark-repeal-of-50-a/ [https://perma.cc/ST6F-MQQ7].

208. Memorandum from Reinvent Albany et al. to Kathy Hochul, *supra* note 205.

209. REINVENT ALBANY, *supra* note 207; *see also* Stern, *supra* note 205.

210. Elliot v. City of New York, 2020 WL 6782046, at *6–7 (S.D.N.Y. Nov. 18, 2020).

211. See *supra* notes 202–207 and accompanying text.

For these reasons, the three arguments advanced by the non-responsive courts—the insulation of federal decision making from state influences, privacy exemptions and redactions, and FOIL access—do not justify continued protective orders over police misconduct records. Moreover, the post-2020 split in New York's federal districts reveals a fundamental disagreement over the role of federal judges in a changing transparency landscape. While the S.D.N.Y. (and *Fowler-Washington*, in the E.D.N.Y.) prioritizes a strict, insulated view of procedural autonomy, the E.D.N.Y.'s responsive approach to state law offers a more principled path forward. Part III expands on the principles of comity and transparency that the E.D.N.Y. cases advance, and proposes that the Second Circuit and its district courts should formally adopt this responsive framework.

III. IN FAVOR OF ACCORDANCE WITH THE 50-A REPEAL

The change in New York's state law *should* matter to the Rule 26(c) good cause inquiry for protective orders. Accordingly, federal courts in New York should find that police disciplinary records do not satisfy "good cause" for a protective order under Rule 26(c) after New York's 50-a Repeal without an additional showing of particularized harm. Two main principles require that federal courts respond to the 50-a Repeal. First, "symmetry" requires that if Civil Rights Law 50-a had bolstered good cause for protective orders while in effect, then its repeal must correspondingly diminish it.[212] And second, attentiveness to the public's interest in state records in federal civil rights litigation requires that the Second Circuit adopt a protective order inquiry that considers the public importance of documents. To do so, courts should look to the "sunshine regime" of the Third Circuit, which provides a structured balancing test that explicitly weighs the public interest in government accountability against private harm.[213] By integrating these state transparency norms into the Rule 26(c) analysis, federal courts can move away from reflexive secrecy and toward a discovery standard that honors both the goals of Section 1983 and the democratic will of the state legislature.

212. *See supra* Part II.A.
213. *See infra* Part III.B.

A. STATE COMITY AND TRANSPARENCY IN FEDERAL DISCOVERY

The precedent on the pre-Repeal influence of Civil Rights Law 50-a on discovery comes from *King v. Conde*, an influential 1988 civil rights case decided by Judge Jack B. Weinstein that determined that "state privacy and privilege law may be a useful referent for courts in federal question cases, but in no event will that law be binding."[214] There, the plaintiffs sought discovery of past disciplinary actions brought against the defendant officers, but the officers objected, invoking CRL 50-a.[215] The court disagreed, ruling in favor of disclosure and against accordance with 50-a.[216] Judge Weinstein held that 50-a did not create an absolute bar to discovery of police personnel records in civil rights litigation, and that courts must instead balance a plaintiff's need for relevant information against the officer's privacy and confidentiality interests.[217]

There are a few ways to interpret *King* after the 50-a Repeal. One reading is that federal Rule 26 inquiries should not consider the 50-a Repeal. This reading relies on *King*'s ultimate divergence between CRL 50-a, which shielded records, and Rule 26(b), which *King* held provided access to the records.[218] Because *King* held that CRL 50-a did not govern disclosure under Rule 26(b), the argument goes, *King* indicates that the *repeal* of 50-a should similarly not affect Rule 26(c).[219] And, true enough, *King* states that "New York state law does not govern discoverability and confidentiality in

214. King v. Conde, 121 F.R.D. 180, 194 (E.D.N.Y. 1988).

215. *Id.* at 186 (recounting that when Suffolk County objected to the discovery demands for prior misconduct records, "[i]t relied in part on New York Civil Rights Law § 50–a and requested an *in camera* review of all the internal documents").

216. *Id.* at 198 (holding that defendants must produce the disciplinary records to plaintiffs because "[i]n sum, except for reasonable redactions of names and addresses to protect privacy or informer sources, plaintiffs in federal civil rights actions are presumptively entitled to recollections as well as documents on prior complaints and police history").

217. *Id.* at 187 (stating that instead of deferring to 50-a, "federal courts must balance the interests favoring and disfavoring disclosure in order to resolve discovery disputes of this kind").

218. *Id.*

219. *See* King v. Conde, 121 F.R.D. 180, 187 (E.D.N.Y. 1988) ("Simple direct application of the state rule would be undesirable and improper."). But note that the reason why applying state law instead of federal law would be improper: Applying 50-a in *King* would "frustrate the important federal interests in broad discovery and truth-seeking and the interest in vindicating important federal substantive policy such as that embodied in section 1983." *Id.* Applying the state's *repeal* of 50-a does not create this tension, as explained *infra*.

federal civil rights actions."[220] So, the argument concludes, *King* disfavors federal accordance with the 50-a Repeal, in its rejection of 50-a and its statement that "questions of privilege in federal civil rights cases are governed by federal law."[221]

That reading proves somewhat superficial and cannot account for the reasoning that drove King's ultimate result. *King* found federal discovery to not be *limited* by 50-a because "the magistrate must vindicate the purposes of federal discovery and privilege law."[222] And that purpose is (among other things) transparency and disclosure: "Federal law disfavors privileges barring disclosure of relevant evidence."[223]

Thus, a better reading of *King v. Conde* focuses on the court's reason for limiting the impact of 50-a: Reluctance to let the state's interest in protecting local officers undermine the federal interest in transparency in civil rights litigation.[224] Now that 50-a is repealed, mirroring state law is no longer in tension with this federal value; it is in harmony. Put otherwise, mirroring the result of the 50-a Repeal in federal discovery *vindicates*—rather than impedes—the underlying purpose of *King*'s decision to disclose the misconduct records. *King*, in this framing, was about the problems of federal accordance with a state law that "frustrate[d] the important federal interests in broad discovery and truth-seeking"—not about accordance with a state law *as such*.[225] Civil Rights Law 50-a was not just a state rule—it was a "state rule[ ] protecting state officers," which "must always be viewed with caution because [it] may be parochially designed to thwart federal interests."[226] *King*'s concern with applying CRL 50-a in a binding

220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* at 187–88 (citing Kelly v. City of San Jose, 114 F.R.D. 653, 656 (N.D. Cal. 1987)); *see also* Herbert v. Lando, 441 U.S. 153, 175 (1979) ("Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances.").
224. See King v. Conde, 121 F.R.D. 180, 187–88 (E.D.N.Y. 1988) (warning that "it would make no sense to permit state law to determine what evidence is discoverable in cases brought pursuant to federal statutes whose central purpose is to protect citizens from abuses of power by state and local authorities").
225. *Id.* at 187 (stating that state law privileges should not apply to shield public discovery in federal civil rights claims because "[i]f state law controlled, state authorities could effectively insulate themselves from constitutional norms simply by developing privilege doctrines that made it virtually impossible for plaintiffs to develop the kind of information they need to prosecute their federal claims").
226. *Id.* at 187–88 (citing *Kelly*, 114 F.R.D. at 656).

way was that "state authorities could . . . develop[ ] privilege doctrines that made it virtually impossible for plaintiffs to develop the kind of information they need to prosecute their federal claims."[227] That fear is only realized when state law works to *shield* records, not disclose them.[228]

The 50-a Repeal means that state law now favors transparency and public access. As a result, the federal Rule 26 inquiry no longer requires balancing the federal interest (in disclosure) against the state interest (in privilege and privacy). Rather, both interests cut towards denying good cause for protective orders over disciplinary records without particularized harm. When state law does not undermine federal transparency values, *King* creates space for federal courts to take it into account.[229] District courts "need not ignore state privacy rules," *King* explained, because "a strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy."[230] Unlike CRL 50-a itself, federal courts can recognize the *repeal* of 50-a without any cost to federal transparency interests. *King* appears to endorse accordance that does not undermine transparency, since it contemplated that future courts "confronted with state privilege laws in federal civil rights claims" may "borrow[ ] from the state policy" and suggested that those courts "make explicit whether, to what extent and for what reasons" they do so.[231] New York courts should do so, borrowing from the 50-a Repeal to refuse to grant protective orders over police disciplinary records without a particularized threat, and, per *King*, explicitly explaining why.[232]

Accordance between Rule 26(c) and the 50-a Repeal would improve transparency in Section 1983 civil rights litigation, which

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227. *Id.* (citing *Kelly*, 114 F.R.D. at 656).

228. See *id.* (explaining that "the overriding policy is one of disclosure of relevant information in the interest of promoting the search for truth in a federal question case"); *see also* Carr v. Monroe Mfg. Co., 431 F.2d 384, 389 (5th Cir. 1970) (describing the "special danger" in permitting state governments to shield their own agents with a state-defined privilege).

229. King v. Conde, 121 F.R.D. 180, 187 (E.D.N.Y. 1988) ("Simple direct application of the state rule would . . . often frustrate the important federal interests in broad discovery and truth-seeking and the interest in vindicating important federal substantive policy such as that embodied in section 1983.").

230. *Id.* (quoting Lora v. Bd. of Ed., 74 F.R.D. 565, 576 (E.D.N.Y. 1977)).

231. *Id.* at 188.

232. *Id.*

"require[s] special attention to full disclosure," according to *King*.[233] Section 1983 litigation operates as "a balancing feature in our governmental structure whereby individual citizens are encouraged to police those who are charged with policing us all."[234] On the other hand, too, "[t]he privacy interest in nondisclosure of professional records should be especially limited" in civil rights cases given "the role played by the police officer as a public servant who must be accountable to public review."[235] *King* thus suggests that the repeal of 50-a should play a *greater* role in protective order determinations than 50-a itself did, because "it is of special import that suits brought under [Section 1983] be resolved by a determination of the truth rather than by a determination that the truth shall remain hidden."[236] After the 50-a Repeal, federal courts in New York should resolve these Section 1983 police misconduct lawsuits by rejecting determinations that the truth should remain hidden, allowing injured plaintiffs to recruit the public in policing violent officers who are charged with policing us all.[237]

B. A MATTER OF PUBLIC IMPORTANCE

Second, courts should frame the change in state transparency laws as implicating a public interest analysis that is weighted towards disclosure. The legislative language around the 50-a Repeal explicitly established a public right to law enforcement disciplinary records to promote public transparency and engagement.[238] Reasoning from other circuits supports this public interest analysis as well. There is no federal guidance on how to treat materials relevant to the public interest under Rule 26(c), but

233. *Id.* at 194.

234. King v. Conde, 121 F.R.D. 180, 195 (E.D.N.Y. 1988) (quoting Wood v. Breier, 54 F.R.D. 7, 10–11 (E.D. Wis. 1972)). Judge Weinstein emphasized the "paramount importance of federal civil rights policy[,]" which counsels broad discovery for federal civil rights violations. *Id.* In Section 1983 cases, the "great weight of the policy in favor of discovery in civil rights actions supplements the normal presumption in favor of broad discovery[.]" *Id.* Together, these two "powerful public policies" pose a high bar for restricted disclosure in federal civil rights litigation. *Id.*; *see also* Jones v. DeRosa, 238 F.R.D. 157, 164 (D.N.J. 2006) ("In a § 1983 case, a claim of governmental privilege 'must be so meritorious as to overcome the fundamental importance of a law meant to insure each citizen from unconstitutional state action.'" (quoting Scouler v. Craig, 116 F.R.D. 494, 496 (D.N.J. 1987))).

235. *King*, 121 F.R.D. at 191.

236. *Id.* at 195.

237. *See supra* Part I.B.

238. *See supra* Part I.B.1.

the Second Circuit (and, until the Second Circuit speaks on the issue, district courts in the Second Circuit) should adopt the Third Circuit's test for protective orders, which specifically contemplates the public importance of documents.

1. *"The People's Right to Know"*

The legislative language around the 50-a Repeal established law enforcement disciplinary records as a matter of public importance in New York, crucial to democratic governance and public safety. FOIL's Legislative Declaration reflects this purpose, stating that "[t]he people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society."[239] In the Legislation Justification for the 50-a Repeal, Senate Sponsor Senator Jamaal Bailey declared that the repeal's purpose was to invite public scrutiny of police misconduct, helping the public "regain trust that law enforcement officers and agencies may be held accountable for misconduct."[240] Disclosure of law enforcement disciplinary records would lead to broader success in "FOIL's public policy goals, which are to make government agencies and their employees accountable to the public."[241]

These goals of public engagement shape the discovery context as well. Some literature has suggested that discovery that "bears upon the administration of public office" justifies "vacating or relaxing confidentiality restrictions."[242] Litigation with a public official as a party is a good proxy for this type of discovery because public officials represent public constituencies, even in litigation, so the public interest "outweighs" litigants' privacy.[243] By extension, courts should "hesitate" to "block disclosure of information that would otherwise be publicly available under federal or state freedom of information laws."[244]

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239. N.Y. PUB. OFF. LAW § 84 (McKinney 2025); *see also* Madeiros v. N.Y. State Educ. Dep't, 86 N.E.3d 527, 531 (N.Y. 2017) ("FOIL is based on a presumption of access in accordance with the underlying 'premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government' . . . ." (quoting Fink v. Lefkowitz, 393 N.E.2d 463, 465 (N.Y. 1979))).

240. S. 8496, 203d Leg. (N.Y. 2020).

241. *Id.*

242. Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 369–70 (1999).

243. *Id.*

244. *Id.*

2. *Common Law Sunshine Regime*

There is no federal statutory guidance on how to treat documents of public importance in litigation secrecy determinations, but the Third Circuit's interpretation of Rule 26(c) may be the best model.[245] Federally, Senator Herbert Kohl unsuccessfully introduced multiple Sunshine in Litigation Acts in the 1990s.[246] Congress called its first hearing on litigation secrecy after a prominent plaintiff's organization drew attention to consumer harms that persisted after health hazards were uncovered in litigation but shielded under broad protective orders.[247] The "Sunshine in Litigation" bill sought to ensure that protective orders would not impede disclosure of information "relevant to the protection of public health or safety."[248] It died in the Senate after lobbyists rallied corporate interests to parry "pro-sunshine" arguments.[249]

The Third Circuit, however, has created what scholars call a "common law sunshine regime" to promote accordance with transparency laws.[250] To guide courts in evaluating whether "good cause" exists under Rule 26(c), the Third Circuit laid out a seven-factor test in *Pansy v. Borough of Stroudsburg*, which it affirmed in *In re Avandia Marketing*.[251] Three of the factors reflect privacy concerns: whether disclosure violates privacy interests, whether

245. *In re* Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 924 F.3d 662, 671 (3d Cir. 2019); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 788 (3d Cir. 1994).

246. *See* Sunshine in Litigation Act, S. 1404, 103d Cong. (1993) (proposing the requirement that a court only enter a Rule 26(c) protective order "after making particularized findings of fact that such order would not restrict the disclosure of information which is relevant to the protection of public health or safety"); Sunshine in Litigation Act, S. 374, 104th Cong. (1995) (same).

247. *See* Engstrom et al., *supra* note 14, at 118 (explaining how the Association of Trial Lawyers of America insisted that tort litigation uncovered serious public health hazards and broad protective orders made courts complicit in perpetuating consumer harm).

248. S. 374.

249. S. 374; Engstrom et al., *supra* note 14, at 119 (recounting that corporate lobbyists feared an expansion of consumer tort lawsuits if evidence relating to health and safety that was disclosed in an individual lawsuit was to be shared with regulators and the general public). Corporate lobbyist Alfred Cortese advanced a view of court transparency for the corporate movement that narrowly construed the public's right to observe as being limited to the right to show up in court when there is a public trial. *Id.*

250. Doré, *supra* note 242, at 316.

251. *In re* Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 924 F.3d 662, 670–71 (3d Cir. 2019) ("We apply the factors articulated in Pansy v. Borough of Stroudsburg, 23 F.3d 772, 783–92 (3d Cir. 1994), when we review orders preserving the confidentiality of discovery materials pursuant to Federal Rule of Civil Procedure 26."); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787–91 (3d Cir. 1994).

the information is sought for an improper purpose, and whether disclosure will cause a party embarrassment.[252] The other four factors relate to public harm from secrecy. One asks whether "confidentiality is being sought over information important to public health and safety"; another asks "whether the sharing of information among litigants will promote fairness and efficiency."[253]

Pansy's final two factors most directly demand a responsive approach to state transparency law changes, and it is this reasoning that courts in the Second Circuit should use their current discretion to adopt. Factor Six asks "whether a party benefitting from the order of confidentiality is a public entity or official," as is true when police officers move to shield their records of civilian complaints, and Factor Seven asks if the case involves issues important to the public.[254] When a government entity is a party, "no protective, sealing or other confidentiality order shall be entered without consideration of its effect on disclosure of [government] records to the public under [state and federal freedom of information laws]."[255] Orders that bind public entities must be "narrowly drawn to avoid interference with the rights of the public to obtain disclosure."[256] As such, "a strong presumption exists against granting or maintaining an order of confidentiality" over information "accessible under a relevant freedom of information law."[257]

Pansy requires a Rule 26(c) analysis that is responsive to state law changes because the "enduring beliefs underlying freedom of information laws" are fundamentally more important than shepherding along efficient discovery.[258] The court recognized the

252. *In re Avandia*, 924 F.3d at 671 (citing Glenmede Tr. Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995)).

253. *Id.*

254. *Id.*

255. *Pansy*, 23 F.3d at 791.

256. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 791 (3d Cir. 1994).

257. *Id.*

258. *Id.* at 792. The *Pansy* facts differed from New York's current contested protective orders because *Pansy* determined whether plaintiffs could access the information under the relevant freedom of information law *at all*, while plaintiffs in New York after the 50-a Repeal may still pursue the disciplinary records under FOIL, even if they are under protective orders in litigation. *See id.* (remanding to determine whether circumstances justify an order of confidentiality, but noting confidentiality would be "unusual" because the case "involves a governmental body"). But this distinction does not interfere with *Pansy*'s balancing test that found the values underlying state freedom of information laws to prevail

costs of accordance with state transparency laws, noting that "we realize that a strong presumption against confidentiality orders when freedom of information laws are implicated may interfere with the ability of courts to encourage the settlement of cases."[259] But that tradeoff is worth it, because state transparency decisions are rooted in values that should not be compromised: "that an informed public is desirable, that access to information prevents governmental abuse and helps secure freedom, and that, ultimately, government must answer to its citizens."[260] Consequently, "[n]either the interests of parties in settling cases, nor the interests of the federal courts in cleaning their dockets, can be said to outweigh the important values manifested by freedom of information laws."[261] Federal courts in New York—without any interpretations of Rule 26(c) from the Second Circuit so far—should adopt this reasoning to deny good cause for protective orders over police disciplinary records in accordance with the state 50-a Repeal.

C. JUDICIAL SOLUTIONS

Courts should adopt the above reasoning in three main areas to align Rule 26(c) protective orders with the state 50-a Repeal by (i) amending the 1983 Plan in S.D.N.Y. Local Rule 83.10; (ii) establishing a Second Circuit test that endorses state transparency values; and (iii) more vigilantly policing protective orders at the district court level.

First, the S.D.N.Y. Rules Committee should amend Local Rule 83.10 to remove police disciplinary records from the automatic Protective Order in the 1983 Plan. The mechanics of this change are simple: The S.D.N.Y. Rules Committee should make an amendment accepting the Civil Rights Committee's petition to strike the presumptive shield over police disciplinary records from the 1983 Plan's protective order.[262] Once the Rules Committee

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against those underlying efficient discovery. Moreover, FOIL is insufficient as a practical alternative to disclosure. *See supra* Part II.C.

259. *Pansy*, 23 F.3d at 791–92.

260. *Id.*

261. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 791–92 (3d Cir. 1994). *Pansy* denounced varied outcomes under Rule 26(c) with respect to state transparency laws, explaining that it hoped its decision would "provide some measure of uniformity and predictability of outcome" when Rule 26(c) protective orders implicate state freedom of information laws. *Id.*

262. *See* Letter, C.R. Comm., *supra* note 121.

recommends an amendment, the Board of Judges may adopt the amendment to the S.D.N.Y. Local Rules.[263] Amending Local Rule 83.10 in this way would flip the existing presumption of transparency for police disciplinary records produced in S.D.N.Y. civil rights litigation, aligning the presumption in federal court with the existing presumption under state law.[264] That is, just as the 50-a Repeal made the disciplinary records presumptively available to the public under the state FOIL unless statutory FOIL exemptions apply, removing the disciplinary records from the automatic 1983 Plan protective order would make them presumptively available for litigants to share unless the court finds good cause under Rule 26(c) to override that presumption of disclosure.[265]

Second, the Second Circuit should address the issue, affirming the responsive judicial approaches to the change in state transparency laws. In contrast to most other circuits, the Second Circuit has not clarified what "good cause" for secrecy under Rule 26(c) requires or what values the good cause analysis should vindicate.[266] The result is stark inconsistency in Rule 26(c) protective orders, both between the S.D.N.Y. and E.D.N.Y. and within the E.D.N.Y. itself.[267] When developing federal interpretations to bind district courts determining good cause for protective orders, the Second Circuit should adopt the Third Circuit's vindication of the values underlying state freedom of information laws and the corresponding *Pansy* factors.[268] The Second Circuit, like the Third Circuit, should direct courts to approach Rule 26(c) inquiries with the premise that "[n]either the interests of parties in settling cases, nor the interests of the federal courts in cleaning their dockets, can be said to outweigh the

263. *See Proposed Amendments*, U.S. DIST. CT.: S. DIST. OF N.Y., https://www.nysd.uscourts.gov/rules/proposed-amendments [https://perma.cc/Z9HT-SAJG] (last visited June 9, 2026) (describing the Local Rule amendment process).

264. Removing police disciplinary records from the automatic protective order in Local Rule 83.10 would remove the assumption of good cause over those records, making the disciplinary records presumptively public unless there is good cause to grant a protective order. *See* FED. R. CIV. P. 26(c); Engstrom et al., *supra* note 14, at 108 (discussing how the default status of discovery is disclosure, unless a court finds good cause to "override" that presumption with a protective order).

265. *See supra* Part I.B.2.

266. *See* Haidon v. Town of Bloomfield, 552 F. Supp. 3d 265, 269 (D. Conn. 2021) ("At least in this Circuit, district courts have not fully settled on a test for evaluating what may amount to 'good cause' under Rule 26(c)."); *see also supra* Part I.A.

267. *See supra* Part II.

268. *See supra* Part III.B.2.

important values manifested by freedom of information laws."[269] The Second Circuit should establish uniformity among its district courts by formally endorsing accordance with state transparency laws and rejecting good cause for materials subject to FOIL.

Third, and most importantly, all district courts in New York presiding over discovery in Section 1983 cases should decline to find good cause for protective orders over police disciplinary records without additional showings of particular harm. Courts faced with contested protective orders should consider challenges to the order's applicability to police disciplinary records, as *Capellan*, *Mingo*, and the other responsive cases did.[270] But, given the pressures on civil rights plaintiffs to stipulate to protective orders, all New York courts presiding over police misconduct lawsuits should impose a searching look for good cause even for the stipulated orders that plaintiffs do *not* challenge.[271] This is, after all, their judicial duty: Courts must find that good cause exists to issue a judicial protective order under Rule 26(c), even when the parties agree to keep the discovery confidential.[272] The Advisory Committee on Civil Rules reaffirmed that courts must engage in this good cause inquiry in 1995 when it rejected a proposal to modify Rule 26(c) to permit courts to grant a protective order for either good cause or "on stipulation of the parties."[273] Since "stipulation of the parties" is inadequate to grant a protective order,[274] courts should refuse to find "good cause" to shield police disciplinary records even if both parties stipulate to the order.

The Sixth Circuit offered an example of what this active patrolling of good cause could look like. In the national opioid litigation, cities, counties, and Native American tribes sued prescription opiate drug manufacturers, distributors, and retailers.[275] In discovery, the district court allowed the plaintiffs to access the Drug Enforcement Administration (DEA) ARCOS database, which monitored the flow of DEA-controlled substances and opened the door for plaintiffs to study the origin of the opioid

269. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 791–92 (3d Cir. 1994).
270. *See supra* Part II.A.
271. *See supra* Part I.B.2 (discussing the dominance of stipulated protective orders).
272. Ribeiro, *supra* note 18, at 174; see also Fed. R. Civ. P. 26(c).
273. Hanlock, *supra* note 4, at 1515.
274. *Id.*
275. *In re* Nat'l Prescription Opiate Litig., 927 F.3d 919, 923 (6th Cir. 2019).

crisis and take steps to address it.[276] Plaintiffs and the DEA then stipulated to a protective order over the ARCOS data and the district court granted the order.[277] Members of the media sought to unseal certain filings, but the district court denied their requests.[278] The Sixth Circuit reversed, holding that "[t]he district court abused its discretion in permitting Defendants and the DEA to file their pleadings under seal."[279] The court abdicated its function by issuing the order under Rule 26(c) because a district court must "'justify nondisclosure to the public,' even if no party objects to their sealing."[280] In that spirit, district courts in New York should not grant protective orders—either contested *or* stipulated—over police disciplinary records without particularized harm. For the reasons discussed above, there is no good cause under Rule 26(c) to shield such records from disclosure after the repeal of Civil Rights Law 50-a, and district courts would abdicate their duty by doing so.

CONCLUSION

This troubled landscape over law enforcement disciplinary records raises a series of tangled questions about transparency, secrecy, the role of the public in civil rights litigation, and the relationship between federal courts and state freedom of information laws. In New York, these questions begin: Is there "good cause" to shield a defendant officer's disciplinary records under a protective order? The S.D.N.Y. has firmly asserted that its judges find automatic good cause to shield these records.[281] But what about now that the New York legislature has vindicated the public's right to those very records? The legal implication is one of

276. *Id.* at 923–25; Ribeiro, *supra* note 18, at 192–94 (defining ARCOS as the "Automated Reports and Consolidated Ordering System").

277. *In re* Nat'l Prescription Opiate Litig., 927 F.3d at 924–25 (describing the protective order as determining that "disclosure [of the ARCOS data] shall remain confidential and shall be used only for litigation purposes or in connection with state and local law enforcement efforts").

278. *Id.*; Ribeiro, *supra* note 18, at 196–97.

279. *In re* Nat'l Prescription Opiate Litig., 927 F.3d at 939.

280. *In re* Nat'l Prescription Opiate Litig., 927 F.3d 919, 939 (6th Cir. 2019).

281. *See* Parts I.B.2.a and II. For assertions of automatic good cause to shield misconduct records in the S.D.N.Y. following the 2020 repeal of CRL 50-a, see generally Elliot v. City of New York, 2020 WL 6782046, at *6–7 (S.D.N.Y. Nov. 18, 2020); S.D.N.Y. CIV. R. 83.10; Letter from Hon. Naomi Reice Buchwald, Chair, S.D.N.Y. Rules Comm., to the C.R. Comm. of the Fed. Bar Ass'n for the S. Dist. (Aug. 6, 2020). In the E.D.N.Y., see Fowler-Washington v. City of New York, 2020 WL 7237683, at *5 (E.D.N.Y. Dec. 9, 2020).

"responsiveness," fostering broader questions: Should federal judges engaging with the Federal Rules of Civil Procedure respond to state law, reorienting Rule 26(c) toward a higher "good cause" standard in accordance with the 50-a Repeal? Or should they sternly demarcate federal analyses from state ones and continue to designate the disciplinary records as confidential in discovery, come what may under FOIL?

This Note posits that some of these answers are clear. Federal courts *should* respond to state law changes, in this case by rigorously applying a heightened good cause standard for protective orders over police misconduct records in civil rights litigation. Good cause does not exist to shield misconduct records in federal court after New York's repeal of 50-a.

Rather, federal courts must adopt a responsive standard that treats state transparency laws and the public interest as a heavyweight factor in the Rule 26(c) good cause inquiry. Treating the 50-a Repeal "symmetrically" with courts' former treatment of 50-a itself suggests that the Rule 26 inquiry should consider state law changes, especially when the state interest cuts toward disclosure. The Third Circuit's "common law sunshine regime" also offers federal guidance in favor of accordance with state transparency laws for courts in the Second Circuit.

The path to aligning civil rights litigation with this answer is in reach. Responsiveness to the 50-a Repeal is available to the Second Circuit (which should adopt the reasoning of the Third Circuit's sunshine regime); to district courts in New York (which should decline to issue stipulated or contested protective orders over misconduct records without additional particularized showings); and to the S.D.N.Y. Rules Committee (which should strike misconduct records from the 1983 Plan's automatic protective order). Outcomes would include a robust state transparency regime, an engaged and invested public, and a safer police force.

There has been little scholarly attention on the effect of state transparency laws on Rule 26(c), and none on New York's 2020 state law change. That partially results from the difficulty of studying protective orders, since the dearth of available judicial decisions reflects the incentives for civil rights plaintiffs to avoid litigating the public's access. The 2020 repeal of Civil Rights Law 50-a thus provides a unique opportunity to examine a little-seen clash between the Federal Rules of Civil Procedure and state

transparency laws. This Note aims to create clarity out of that clash, with a recommendation: As *King* suggested, the question of law enforcement disciplinary records should be "resolved by a determination of the truth rather than by a determination that the truth shall remain hidden."[282]

282. King v. Conde, 121 F.R.D. 180, 195 (E.D.N.Y. 1988).